

# **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1942**

**No. 580**

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**BERTHA A. OWENS, EXECUTRIX OF THE ESTATE  
OF LEYLE F. OWENS, DECEASED, PETITIONER,**

*vs.*

**UNION PACIFIC RAILROAD COMPANY**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED DECEMBER 10, 1943.**

**CERTIORARI GRANTED JANUARY 18, 1943.**

NO. 9940

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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UNION PACIFIC RAILROAD COMPANY, a  
corporation,

Appellant,

VS.

BERTHA A. OWENS, Executrix of the Estate of  
Leyle F. Owens, Deceased,

Appellee.

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**Transcript of Record**

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Upon Appeal from the District Court of the United  
States for the Eastern District of Washington,  
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland, Oregon,

Attorney for Appellee.

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In the District Court of the United States  
for the Eastern District of Washington

Civil No. 173

**BERTHA A. OWENS, Executrix of the Estate of  
Leyle F. Owens, Deceased,**

**Plaintiff**

vs.

**UNION PACIFIC RAILROAD COMPANY, a  
corporation,**

**Defendant**

**AMENDED COMPLAINT**

Plaintiff for her amended complaint herein complains of defendant and for cause of action alleges:

## I.

That on or about the — day of February, 1939, such proceedings were had in the Superior Court of the State of Washington for the County of Spokane in the Matter of the Estate of Lyle F. Owens, deceased, that Letters Testamentary were duly granted thereon to plaintiff as sole executrix thereof and that she thereafter qualified and ever since has been, and is now, the executrix of such estate.

## II.

That the plaintiff is a citizen of the State of Washington, and that the defendant is a corporation incorporated under the laws of the State of Utah and the matter in controversy exclusive of interest and costs exceeds the sum of \$3000.00.

## III.

That during all of the times herein mentioned defendant owned and operated in interstate commerce a line of railroad as a common carrier from Washington into the State of Oregon and other states of the United States and had and maintained as a part of its said railroad certain switching yards located in the City of Spokane, Washington, upon which it moved and switched cars with steam motive power. That during all of the times herein mentioned defendant had in force a rule that provided [1\*] in effect that a proceed signal should be given in the switching and moving of cars by raising and

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

lowering the hand vertically, and a further rule providing that signals must be given from a point where they can be plainly seen and in such a way that they cannot be misunderstood, and a further rule providing "30. Engine bell must be rung when an engine is about to move and when approaching and passing public crossings at grade, stations, tunnels and snowsheds."

#### IV.

That on or about the 16th day of February, 1939, plaintiff's decedent was in the employ of the defendant for hire as an engine foreman and in the afternoon of said day was engaged in the performance of his duties as such in switching cars upon a certain track of defendant's in its said yards at Spokane, Washington; that said cars were coupled together and had an engine attached thereto and were moved upon a certain track and stopped preparatory to switching and moving said cars upon another track of defendant's; that plaintiff's decedent in the direct prosecution of his duties and under instructions of defendant, after said cars had stopped walked across the track in front of said cars to throw a switch in order that said cars could be switched and moved on said track leading from said switch and that after throwing said switch for said track plaintiff's decedent was moving back across said track and through the negligence of the defendant hereinafter stated said engine and cars were moved upon said track toward plaintiff's



decedent while he was upon said track and he was struck thereby, said cars passing over him and severely crushing and wounding both legs necessitating the amputation thereof, and he was otherwise bruised and injured over his entire body and shocked and as a result thereof he endured conscious pain and suffering from the time of the receipt of said injuries and for a period of about two and one-half hours subsequent thereto at the expiration of [2] which time he succumbed and by reason of such pain and suffering plaintiff as decedent's personal representative has been damaged in the sum of \$10,000.00 and such cause of action is hereby brought on behalf of herself as surviving widow of deceased.

#### V.

That the aforesaid injuries to plaintiff's decedent causing his death were due proximately to the negligence of the defendant in the following respects: (a) that defendant and defendant's employes carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars; which said lookout was the custom and practice known to and adopted by defendant; (b) that defendant and defendant's employes carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent; (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected

to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars; the receipt of which said signal was the custom and practice known to and adopted by the defendant; (d) that defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move; (e) that defendant carelessly and negligently failed and neglected to provide plaintiff with a safe place to work.

## VI.

That at the time of the aforesaid injuries to plaintiff's decedent causing his death, defendant was engaged in switching and moving cars with which plaintiff's decedent was working, in and for the transportation of interstate commerce in that said cars were loaded or to be loaded with commodities which were shipped into the State of Washington from Oregon or other parts of the United States and were destined from the State of Washington to Oregon, Idaho, or other States of the United States [3] and the plaintiff's decedent and defendant were then and there engaged in the movement of cars which were in the furtherance of the interstate commerce business carried on by defendant as a common carrier.

For a second cause of action against defendant, plaintiff alleges:

I.

Reiterates each and every allegation contained in Paragraphs I, II, III and VI of the first cause of action and makes the same a part hereof as though fully impleaded herein.

II.

That on or about the 16th day of February, 1939, plaintiff's decedent was in the employ of the defendant for hire as an engine foreman and in the afternoon of said day was engaged in the performance of his duties as such in switching cars upon a certain track of defendant's in its said yards at Spokane, Washington; that said cars were coupled together and had an engine attached thereto and were moved upon a certain track and stopped preparatory to switching and moving said cars upon another track of defendant's; that plaintiff's decedent in the direct prosecution of his duties and under instructions of defendant, after said cars had stopped, walked across the track in front of said cars to throw a switch in order that said cars could be switched and moved on said track leading from said switch and that after throwing said switch for said track plaintiff's decedent was moving back across said track and through the negligence of the defendant hereinafter stated said engine and cars were moved upon said track toward plaintiff's decedent while he was upon said track, and he was

struck thereby, said cars passing over him and severely crushing and wounding both legs necessitating the amputation thereof, and he was otherwise bruised and injured over his entire body and shocked and as a result thereof he was mortally wounded and died about two and one-half hours subsequent thereto. [4]

### III.

That the aforesaid injuries to plaintiff's decedent causing his death were due proximately to the negligence of the defendant in the following respects: (a) that defendant and defendant's employes carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars; which said lookout was the custom and practice known to and adopted by defendant; (b) that defendant and defendant's employes carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent; (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars; the receipt of which said signal was the custom and practice known to and adopted by defendant; (d) that defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, be-

fore moving said engine and cars or when same were about to move; (e) that defendant carelessly and negligently failed and neglected to provide plaintiff with a safe place to work.

#### IV.

That plaintiff's decedent at the time of and prior to his death was an able-bodied man of the age of about 53 years and had a life expectancy of about 18.79 years, was earning and capable of continuing to earn the sum of approximately \$2700.00 a year and was contributing large sums of money regularly toward the support and maintenance of Bertha A. Owens, his wife, now widow of deceased, and had he not been killed as aforesaid, would have continued to so contribute to her support during the rest of his natural life and that by reason of the death of plaintiff's decedent through the negligence of the defendant as aforesaid his said widow has been damaged in the sum of \$40,000.00. [5]

Wherefore plaintiff demands judgment for the sum of \$10,000.00 on her first cause of action, and the further sum of \$40,000.00 on her second cause of action, and her costs and disbursements incurred herein.

**FRANK C. HANLEY**

Attorney for Plaintiff

407 Yeon Bldg.

Portland, Oregon [6]

State of Washington  
County of Spokane.—ss.

I, Bertha A. Owens, Executrix of the Estate of  
Leyle F. Owens, Deceased, being first duly sworn,  
depose and say:

That I am the plaintiff in the within entitled  
cause and that the foregoing Amended Complaint  
has been read by me and I know the contents there-  
of, and that the same is true as I verily believe.

**BERTHA A. OWENS**

Subscribed and sworn to before me this 14th day  
of April, 1941.

(Notarial Seal) **FLETA VAN DYKE**

Notary Public in and for the State of Washington,  
residing at Spokane.

Service of the within Amended Complaint is here-  
by admitted by copy this 15th day of April, 1941,  
and written consent to said Amended Complaint  
acknowledged.

**HAMBLENT GILBERT &  
BROOKE**

Attorneys for Defendant.

[Endorsed]: Filed Apr. 15, 1941. A. A. LaFram-  
boise, Clerk. [7]

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[Title of District Court and Cause.]

**ANSWER TO AMENDED COMPLAINT.**

Comes now the defendant Union Pacific Railroad  
Company, a corporation, and in answer to the

amended complaint of the plaintiff admits, denies and alleges as follows:

I.

Admits the allegations of plaintiff contained in Paragraph I of said amended complaint.

II.

Admits the allegations of plaintiff contained in Paragraph II of said amended complaint.

III.

Admits that during the times mentioned in plaintiff's amended complaint, defendant owned and operated in interstate commerce a line of railroad as a common carrier from Washington into the state of Oregon and other states and maintained as a part of said system certain switching yards located in the City of Spokane, Washington, as alleged in Paragraph III of said amended complaint; admits that defendant had in force certain rules as alleged in said Paragraph III, but alleges that said rules, and each of them, had no application in any way to the switching movement which was being made at the time of the alleged accident as set forth in plaintiff's amended complaint.

IV.

Denies that plaintiff's decedent at the time of the accident alleged to have occurred as set forth in Paragraph IV of plaintiff's amended complaint was acting under instructions of the defendant; or that through the negligence of the defendant plaintiff's



decedent was struck by defendant's engine and cars, as alleged in said paragraph IV of plaintiff's amended complaint; alleges that defendant has no knowledge or information sufficient to form a belief as to the allegations of conscious pain and suffering of plaintiff's decedent, as set forth in said paragraph IV of plaintiff's amended complaint, and therefore denies each of said allegations; denies that by reason of the pain and suffering of plaintiff's decedent, plaintiff as decedent's personal representative has been damaged in the sum of \$10,000.00, or in any sum whatsoever, as alleged in said Paragraph IV of plaintiff's amended complaint; as to the other allegations contained in said paragraph IV of plaintiff's amended complaint, defendant admits the same.

### V.

Denies that defendant and its employes carelessly or negligently failed or neglected to keep a proper lookout for plaintiff's decedent or to ascertain his whereabouts before moving said cars as alleged in sub-paragraph (a) of Paragraph V of said amended complaint; or that defendant and its employes carelessly or negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent, as alleged in sub-paragraph (b) of said Paragraph V of said amended complaint; or that defendant or its yardmen carelessly or negligently failed or neglected to receive a hand signal from plaintiff's decedent before signaling



its engineer to kick or move the aforesaid cars, as alleged in sub-paragraph (c) of Paragraph V of said amended complaint; or that defendant or its enginemen carelessly or negligently failed or neglected to ring the bell of the engine as alleged in sub-paragraph (d) of said Paragraph V of said amended complaint, and denies that there is any rule requiring the ringing of the bell of the engine in the switching movement being made at the time of the alleged accident; or that defendant carelessly or negligently failed or neglected to provide plaintiff's decedent with a safe place to work as alleged in sub-paragraph (e) of said Paragraph V of said amended complaint.

## VI.

Admits the allegations of plaintiff contained in Paragraph VI of said amended complaint.

In answer to the second cause of action against this defendant, as alleged in plaintiff's amended complaint, defendant [9] admits, denies and alleges as follows:

## I.

Reiterates each and ever allegation contained in defendant's answer to paragraph I, II, III, and VI of the first cause of action of plaintiff, and makes the same the answering paragraphs to Paragraphs I, II, III and VI of the second cause of action the same as though fully pleaded herein.

## II.

Defendant denies that plaintiff's decedent was employed in the prosecution of his duties under the instructions of defendant, as alleged in paragraph II of said second cause of action; denies that plaintiff's decedent was struck by the defendant's engine and cars through the negligence of defendant, as alleged in paragraph II of said second cause of action; defendant alleges that it has no knowledge or information sufficient to form a belief as to the extent of the injuries sustained by plaintiff's decedent, as alleged in said paragraph II, except defendant admits that the plaintiff's decedent died shortly after said accident as the result of injuries received therein; as to the other allegations contained in said Paragraph II, defendant admits the same.

## III.

Denies that defendant and its employes carelessly or negligently failed or neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars as alleged in sub-paragraph (a) of Paragraph III of said second cause of action; or that defendant and its employes carelessly or negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent, as alleged in sub-paragraph (b) of said Paragraph III of said second cause of action; or that defendant and its yardmen carelessly or negligently failed and neglected to receive a hand signal from plaintiff's decedent before signaling its engineer to kick or move the aforesaid cars.

as alleged in sub-paragraph (c) of Para- [10] graph III of said second cause of action; or that defendant and its enginemen carelessly or negligently failed and neglected to ring the bell of the engine as alleged in sub-paragraph (d) of said Paragraph III of said second cause of action, or that there is any rule requiring the ringing of the bell of the engine in the switching movement being made at the time of the alleged accident; or that defendant carelessly or negligently failed or neglected to provide plaintiff's decedent with a safe place to work as alleged in sub-paragraph (e) of said Paragraph III of said second cause of action.

#### IV.

This defendant denies that the plaintiff has been damaged in the sum of \$40,000.00 through the negligence of defendant, as alleged in paragraph IV of said second cause of action set forth in plaintiff's amended complaint, or in any sum whatsoever by or through the negligence of this defendant: defendant admits that plaintiff's decedent was an able-bodied man prior to his death and was earning and capable of earning approximately the amount set forth and alleged in said paragraph IV of said second cause of action. As to the other allegations contained in said paragraph, defendant alleges that it has no knowledge or information sufficient to form a belief and therefore denies the same.

For a further answer and as its first affirmative defense to plaintiff's amended complaint and the

alleged causes of action therein contained, defendant alleges as follows:

I.

That defendant is a corporation incorporated under the laws of the State of Utah and is authorized to do business as a railroad company in the state of Washington and has paid all license fees due the state of Washington to date hereof.

II.

That during all of the times herein mentioned defendant operated an interstate and intrastate line of railroad as a common [11] carrier doing business in the states of Washington and Oregon and maintained in the city of Spokane, Washington, a switch yard in connection with said operations.

III.

That on the 16th day of February, 1939, plaintiff's decedent was employed by this defendant as engine foreman and had been so employed for many month prior thereto; that as engine foreman aforesaid said plaintiff's decedent was thoroughly familiar with the switch yard and lay-out of defendant in Spokane, and at the time in question was in charge of the switching operation and gave the switching directions and signals in connection with the operation of defendant's engine and cars being switched at the time of the accident; that while defendant's engine and cars were moving under the direction of said plaintiff's decedent he carelessly

and negligently stepped in front of said moving train and thereupon was struck and sustained injuries which resulted in his death; that the carelessness and negligence of plaintiff's decedent as herein alleged was the proximate cause of the injuries sustained by him and his resultant death.

For a further answer and as its second affirmative defense to plaintiff's amended complaint and the alleged causes of action therein contained, defendant alleges as follows:

### I.

That defendant is a corporation incorporated under the laws of the State of Utah and is authorized to do business as a railroad company in the state of Washington and has paid all license fees due the state of Washington to date hereof.

### II.

That during all of the times herein mentioned defendant operated an interstate and intrastate line of railroad as a common carrier doing business in the states of Washington and Oregon and maintained in the city of Spokane, Washington, a switch yard in connection with said operations. [12]

### III.

That on the 16th day of February, 1939, plaintiff's decedent was employed by this defendant as engine foreman and had been so employed for a long time prior thereto; that as engine foreman aforesaid, said plaintiff's decedent was thoroughly

familiar with the switch yard and lay-out of the defendant in Spokane, and at the times in question was in charge of the switching operations for the engine and cars involved in the accident described in plaintiff's amended complaint; that plaintiff's decedent was thoroughly familiar with the work required of him in handling said switching operations, and fully apprized of and familiar with the hazards and risks involved in said work, and was particularly familiar with and apprized of the hazard and risk of stepping on to or walking along the track in front of cars about to be moved over said track during a switching operation; that in stepping on to the track in front of cars which were about to be moved thereover in said switching operation, plaintiff's decedent assumed the risk of being struck thereby and of sustaining the injuries which resulted in his death.

Wherefore defendant prays that plaintiff take nothing herein, and that said action be dismissed and judgment of dismissal be entered herein.

**ROY F. SHIELDS**

Portland, Ore.

**HAMBLEN GILBERT &  
BROOKE**

915 Paulsen Bldg.


Spokane, Wash.

Attorneys for Defendant.

State of Washington,  
County of Spokane.—ss.

L. R. Hamblen, being first duly sworn on oath, deposes and says: that he is one of the attorneys for the above named defendant and makes this verification for and on its behalf for the reason that none of the officers of said corporation are present within the State of Washington and capable of making said verification; that he has read the foregoing answer to amended complaint, knows the contents thereof and that the same is true as he verily believes.

**L. R. HAMBLÉN**

Subscribed and sworn to before me this 17th day of April, 1941. 

(Notarial Seal) **FRED W. GILBERT**

Notary Public in and for the State of Washington,  
residing at Spokane.

[Endorsed]: Filed Apr. 18, 1941. A. A. LaFramboise, Clerk. [14]



[Title of District Court and Cause.]

Before:

Honorable Lewis B. Schwellenbach, Judge, and  
a Jury duly empaneled and sworn.

At Spokane, Washington.

Date:

April 21, 22, 1941.

Appearances:

For the Plaintiff:

Mr. Frank C. Hanley, attorney for Plaintiff.

For the Defendant:

Hamblen, Gilbert & Brooke, attorneys for  
the Defendant.

STATEMENT OF FACTS  
(TESTIMONY)

[15]

On this 21st day of April, 1941, the above entitled cause coming on for hearing and for trial before the Honorable Lewis B. Schwellenbach, Judge of the District Court of the United States for the Eastern District of Washington, and all parties having announced ready for trial, the following proceedings were had, testimony taken and exhibits introduced.

Mr. Hanley: If the Court please: at this time I would like to move the Court for an order allowing an amendment by interlineation plaintiff's amended complaint.

Judge Schwellenbach. Any objection?



Mr. Hamblen: No, your Honor. We have no objection.

Mr. Hanley: I have prepared a Motion and Order.

Judge Schwellenbach: The Motion will be granted.

Mr. Hanley: I would like to amend paragraph V of the First Cause of Action and paragraph III of the second cause of action in this manner: by inserting the words "or other" after the third "hand" in line 22 of Paragraph V on page 3; and after the word "hand" in line 20 of Paragraph III on page 5.

By inserting the words "which said lookout was the custom and practice known to and adopted by defendant" after the word "cars" in line 17 of Paragraph V on page 3; and after the word "cars" in line 15 of paragraph III on page 5.

By inserting the words "the receipt of which signal was the custom and practice known to and adopted by defendant" after the word "cars" in line 24 of Paragraph V on page 3; and after the word "cars" on line 22 of Paragraph III on page 5.

[17]

We will make the change in the original some time today.

Whereupon a Jury was duly empanelled and sworn to try this cause.

Mr. Hanley: If the Court please: Gentlemen of the Jury:

This case is an action brought by Bertha A. Owens the lady sitting at the table here, as executrix of the estate of her husband, Leyle F. Owens,

deceased, against the Union Pacific Railroad. Mr. Owens prior to his death, and I think the testimony will show for approximately 22 years, was an employee of the Oregon-Washington Railway and Navigation Company, and subsequently the Union Pacific Railway Company which succeeded to the properties of the Oregon-Washington Railway & Navigation Company, working in the yards at Spokane. He was an engine foreman at the time he met his death, which was on February 16, 1939. The evidence in the case will show that on that date he was engaged with his crew which consisted of two helpers, the one whose duty it was to follow the engine, and the other called the field man. They had a switch engine, I think Number Seventeen Hundred and something, and that was operated by an engineer and fireman. About three in the afternoon on that date they had moved two box cars from the west end of the yard close to Washington Street, down on the track, I think its called a "lead" track, close to Division Street. About three—between three and four hundred feet west of Division Street there is a switch for this [18] lead track that leads to another track of the railway company, and evidently leads on to what is called track 13—I believe they refer to that switch as switch No. 7, leading off of the lead track. These box cars were moved down close to Washington Street, and moved on East down to within about, anywhere from ninety to a hundred and fifty feet from Division Street—that would be west of Division Street. The tracks at that place curve to the

south and then back to the north. I believe one of the witnesses will testify as they were coming down thru the yards on this lead track this foreman, Mr. Owens, told him to let those two cars go on track 13. They got down past this track, No. 7 switch—on past it some seven or ten, possibly fifteen, feet, there may possibly be some evidence to the effect it was farther, and as they were passing the switch Mr. Owens, who was the engine foreman and had been riding on the rear end of the head car, dropped off at the switch on the north side of the track, he gave the stop signal and then stepped across in front of the cars that were attached to the engine, to throw the switch so that the two cars could be moved and switched on down to track 13, and when he crossed the track and when the cars stopped he was completely out of the view of the switchman, Koefod, and the engineer and fireman, in fact, neither the fireman or the engineer, the testimony will show, could receive any signal from him as to when the switch was thrown while he was on the south side of the track. The engine and cars, after the engineer received the stop signal, came to a stop, then the switchman, Koefod, [19] who was a member of the crew, he gave the signal to the engineer to move them forward, the kick signal, I think the testimony will show, which was to move them forward with some acceleration. The cars started to move and as the cars started to move Mr. Owens, who had thrown the switch in the meantime, started to pass back across the track, and had got to about the middle of the track, he

looked around and saw he was right up against the cars the cars struck him and he was thrown under the cars and his two legs were cut off pretty close to his hip. The wheels passed over him and I think the testimony will show he was probably dragged down some thirteen or fourteen feet, and as the cars went on down he was then discovered by the engineer and switchman. He had pulled himself to the south side of the track, and was then picked up by a member of the train crew and the engineer that was there and sent to the hospital. He lived, from about the time he was injured he lived about two and one-half hours. This action is brought under what is known as the Federal Employees Liability Act. The law of this act the Court will instruct you on, but it gives the right of action that didn't exist before its passage to the widow or personal representative of the deceased, which is the executrix in this case, for her benefit for money loss she sustained on account of his death. It likewise gives the right of action for conscious pain and suffering to be recovered by her for the amount he could have recovered had he lived.

This action is based on four grounds of negligence. [20] The railroad companies in the operation of their railroad have a book of rules, and that book of rules is a guide to the employees for the operation of the railroad, and in this particular instance it is the plaintiff's position that these rules that I am about to refer to governed the operation that was being made at the time. That the defendant had a rule in force and effect that the proceed

signal should be given by raising and lowering the hand vertically, and a further rule providing that signals must be given from a point where they can be plainly seen and in such a way that they can be understood, and a further rule that the engine bell must be rung when the engine is about to move and when approaching and passing public crossings at grade, stations, tunnels and snowsheds. Those are the rules, at least a part of them which plaintiff will show were in force at the time of this operation. Now, the cause of the conscious pain and suffering and death, it is claimed by the plaintiff, was due to the negligence of the defendant as follows:

(a) that defendant negligently failed to keep a proper lookout for the plaintiff's whereabouts before moving the cars which lookout is a custom and practice known to and adopted by the railway company, or the defendant and

(b) that the defendant carelessly and negligently moved those cars without any notice or warning whatsoever to Mr. Owens, and

(c) that the yardmen negligently failed and neglected to receive a hand signal from Mr. Owen before signalling the engineer to kick or move the cars, and [21]

(d) that defendant's engineer carelessly and negligently failed and neglected to ring the bell on the engine, as provided by the rule, when the cars were about to move, or to give a warning of any kind.

Those are the grounds of negligence, they are

four in number, that the plaintiff claims she is entitled to recover on.

By the plaintiff's testimony we expect to show it was the practice of members of the train crew to look out for each other in order to avoid just what happened here. They keep in touch with each other. I think we will also show it was the practice under conditions where Foreman Owens was out of the view of the engineer and fireman, also out of view of the other switchman, to have received a signal from Owens who had gone across and thrown the switch. It's the practice, also, they should have waited until he crossed the track and then gave the signal to switchman Koefod to repeat to the engineer to move, and that was the safe way of conducting the operation in the exercise of reasonable care. Further, there will be testimony to the effect, and I think the testimony will be undisputed, the engine bell did not ring in accordance with this rule, nor was any whistle blown, or any kind of signal given to the decedent that they were going to move. That, I think, will be undisputed. I think the contention will be made that the rule doesn't apply. The Court, of course, on the law of the case with reference to what rules do or do not apply will instruct you, and you will have the [22] benefit of the instructions of the Court.

Now, the damages sought by the plaintiff here—not brought in her own name but as executrix of the estate—the law provides it be brought by a representative of his estate—in the first cause of action plaintiff claims \$10,000 for pain and suffer-



ing Mr. Owens endured for approximately two and a half hours from the time of his injury until he died. That, I think the evidence will show, he did suffer. He showed all evidence of it and was conscious during the time—there can be no doubt he really felt the pain and suffering. And on the damages sought here for the death of the decedent, that under the law is based upon the benefits Mrs. Owens received from him, or in other words, she had anticipated to receive from him during the rest of his natural life. The testimony will show that Mrs. Owens was probably 44 years old at the time this accident happened, which was over two years ago, in fact, two years ago now; that he was a man of fifty-three years of age at the time he met with the accident and his death, and was earning approximately from two hundred and thirty to two hundred and forty-five dollars a month, approximately \$2700 a year; of that sum of money it was his practice to turn the check over to her. He lived at home—I think the testimony will show she got approximately \$150 of the monthly check for herself, and had been doing it for many years. The law gives her a right of action for what she has actually suffered in a monetary way, and that is measured by the measure of the contributions. However, [23] that is going to be a question for the jury to determine. If he was fifty-three years of age, and according to the American Experience Table of Mortality, he had a life expectancy of 18.79 years, earning about \$2700 a year, and the claim is had he lived his normal span of life he would have continued to

contribute to his wife's support during that period of time. That is a question of fact for the jury. We have asked in this cause of action for \$40,000. Now the measure of damages, the Court will instruct you on as to the law in this case, isn't the amount of money, if you would determine he would live the full 18.79 years he would have earned and contributed, but that sum of money is to be used as a basis in your calculations for applying the earning power of that money paid in monthly in installments.

Now to these claims of the plaintiff of negligence, and claims of damages Counsel, of course, for the defendant will explain his position and theory. I briefly want to explain what the claim is and leave the details of it up to Counsel for the defendant. The railway company here denies they were guilty of any negligence. They claim in their first defense that Mr. Owens in stepping on the track in front of the cars when the cars were about to move, that that was the fault of his death; in other words, guilty of contributory negligence, negligence himself which caused his own death, and they claim that was the sole cause of his death, and as the result of that there should be no recovery, and claim, likewise, in that case the assumption of risk. That defense arises out of contractual employment. [24] That defense, in legal effect, is that the employee assumes all ordinary, open and obvious and visible risk that he knows and anticipates. It is the contention in their second cause of action that he was in charge of the operations, knew the lay-out



of the yards, was familiar with the giving of hand signals and switching, and so under the circumstances, and knowing all of those things, and stopping on the track in front of the cars as they were moved or stopped by him that he assumed the risk and for that reason plaintiff would not be entitled to recover. But I think after you have heard the evidence in the case and the instructions of the Court, it will be your duty to determine whether or not there was negligence on the part of Mr. Owens. There is one other phase of the case and that is the question of contributory negligence. That is in the case. It isn't definitely pleaded but it is a part of the case, a part of the defense in the case. That defense goes to the relation of any damages the plaintiff might be entitled to recover, should you find the decedent himself was guilty of negligence, and also find that the company was guilty of negligence. In other words, if you first find the company was guilty of negligence, then you find the decedent was guilty of negligence, that is, of contributory negligence, contributing to his own death, then you compare the negligence, one against the other, and diminish whatever the plaintiff's decedent's representative would be entitled to in proportion to the negligence of the decedent. In other words, it is not what we call a complete defense, but only one in mitigation [25] of damages by the rule of comparison, where the greater fault lies. I hope I have given you some idea of what the case is about.

Mr. Hamblen: I think we will reserve our statement.

Judge Schwellenbach: Very well.

Whereupon

**JOHN W. CUNNINGHAM,**

a witness called for and on behalf of the plaintiff,  
having been first duly sworn, testified as follows on

**Direct Examination**

By Mr. Hanley:

Q. What is your name?

A. John W. Cunningham.

Q. Where do you live?

A. 2114 West Montgomery, Spokane.

Q. What is your occupation?

A. Retired Engineer.

Q. In whose employ were you prior to the time you retired?

A. Union Pacific Railway Company.

Q. How long have you been employed by the Union Pacific Railroad Company?

A. About 31 years.

Q. How many years were you a locomotive engineer? A. Since 1923.

Q. And on what part of the railroad were you employed? A. Road service.

Q. You have worked in the Spokane yard? [26]

A. I have.

Q. How long were you employed in the Spokane yard as locomotive engineer?

(Testimony of John W. Cunningham.)

A. On different occasions. I have no way of keeping track of it.

Q. Could you approximate your time?

A. No, I could not.

Q. Well, was it a month?

A. Well, I went up there several times off the extra board in Tekoa on switch engine service.

Q. How long were you working there in '38, would you know? A. In the yard?

Q. Yes sir, in the yard.

A. Well, I was up there for one day at that time.

Q. In '38?

A. That was when Mr. Owens——

Q. That was in '39. Were you working in the yard in '39? A. Yes sir, one day.

Q. What day was that, if you remember?

A. Around the 16th.

Q. Was that the day Mr. Owens met his death, or accident? A. Yes sir.

Q. On what switch engine were you employed that day?

A. Well, I was on what is called a 'tramp' job. Just put on for one day to keep up with the work.

Q. You worked between Washington and Division Streets, in Spokane, on that day, did you? [27]

A. I did.

Q. Do you recall the accident happening to Mr. Owens? A. I do.

Q. About what time of day was that?

(Testimony of John W. Cunningham.)

A. It was a little after three—a short time after three.

Q. In the afternoon?

A. In the afternoon.

Q. What kind of a day was it?

A. It was a little rainy, not very much.

Q. Was it wet in the yard, around under foot?

A. No, not exactly wet. It was a little damp. It had rained a couple of days to my knowledge previous to that.

Q. Was the visibility clear in the yard?

A. It was.

Q. Where were you at the time the accident happened to Mr. Owens?

A. I was on track 7 or 8, I don't remember which it was—I had went in out of the way so they could go ahead with their work.

Q. Did you see the engine on Mr. Owens' crew, with two cars attached, move past your engine?

A. I did.

Q. Where had they gone for those two cars, if you know?

A. I don't know. I couldn't say. There were cars on both sides of where I was.

Q. Do you know the name of the track they moved those two cars up on—was it the lead track?

A. In my estimation it was the lead track.

A. They got them down below where you were?

[28]

A. Yes, No. 1 or 2 track.

(Testimony of John W. Cunningham.)

Q. Is that east or west of where your engine was standing?      A. South.

Q. The cars passed you? You saw them pass you?

A. I didn't see them. I saw part of them. There were cars between my engine and the cars they were backing up.

Q. Did you see where they went to?

A. Well, they went up, in my estimation, over the lead switch.

Q. You saw them go up there?

A. I can't say I did.

Q. Did you see them up there?      A. Yes.

Q. Did you see Mr. Owens or any of the rest of the crew handling that engine and cars?

A. I did.

Q. Do you know where Mr. Owens was at the time they passed you?      A. I don't.

Q. Do you know where Mr. Koefod was? Was he in the crew, also?      A. Yes sir.

Q. Do you know where he was?

A. I do not.

Q. Where did the cars stop, then?

A. They stopped over the lead switch.

Q. Do they refer to that as No. 7 switch, also?

A. Six or seven—I wouldn't say for sure. [29]

Q. Where did the switch lead to?

A. Leads to all the switches in the yard.

Q. It leads from the lead track?

(Testimony of John W. Cunningham.)

A. Yes. That's what distributes them in the yard. That's where they do their switching.

Q. That would, also, be the switch that leads to track 13?

A. Yes. Well, I ain't sure about that one switch.

Q. Well, anyhow, did you see them standing beyond that switch, or close to it, or where?

A. At the time of the accident?

Q. Before the accident. A. I did, yes.

Q. How far were they beyond that switch, east?

A. They were probably half a car length.

Q. And a car length is about forty feet.

A. Forty or fifty feet.

Q. Then they were from twenty to twenty-five feet? A. Yes.

Q. Would that be East of the switch?

A. East of the switch.

Q. Do you know where the switch is located with reference to Division Street?

A. Well, that switch is quite a little ways from Division Street.

Q. Could you estimate it?

A. I would say probably 150 yards, a rough estimate.

Q. That would be around 450 feet, somewhere along there?

Judge Schwellenbach: The switch is 450 feet west of [30]

A. Yes. Our road calls it East on the time card

Q. But it's really west? A. Yes.

(Testimony of John W. Cunningham.)

Q. (By Mr. Hanley) How many cars were there?

A. They pulled quite a few out of there.

Q. You mean it was the west end of the last car of the string?

A. That would be the west end.

Q. Which way was the engine headed?

A. It was headed west.

Q. Then when they went down the lead track they backed up with these two cars. The engine would be backing when they went down to pass this lead switch?

A. Yes, backing up to get over the switch.

Q. And they got over the switch about twenty or twenty-five feet. A. Yes.

Q. And that would mean it would be the west end of the west car of the cars the engine had hold of. A. That's right.

Q. That's where you measure from the switch to the west end of the west car of the cars the engine had hold of. Will you go ahead and state what you saw. Let me ask you, first, how far away were you from this switch and from these cars when they stopped—in your estimation?

A. I would give a rough estimate of about 600 feet. I am not positive about that.

Q. Was there anything obstructing your view from where you were to this switch and to the end of these cars? [31] A. No.

Q. You had a clear view? A. I did.



(Testimony of John W. Cunningham.)

Q. State just what you saw to the jury.

A. Well, they backed out of the yard here with several cars—I don't know how many they had—I was on what they call the spot waiting for them to get out of the way because two crews can't work very well in that yard at that particular point, and of course the reason I was looking back I wanted to go to work as soon as they were ready to go over to the yard, or wherever they wanted to go, you see, and this last switch—they made several passes—I know Mr. Owens was throwing the switches—he never crossed over that I see—he just throwed the switch as they were making the movements—of course, what the movements were I don't know—

Q. Are you testifying to what you saw up at track switch 7?

A. I will when I get there.

Q. I see. Go ahead.

A. And at the last switch they had—I am not sure whether they had two cars, but I think that's what it was—I know the engine was all that was left when they pulled the pin in—of course I didn't notice where the cars were took—I didn't see Mr. Owens throw the last switch—I saw him make several passes previous to that—just as I looked up I saw Mr. Owens, he must have throwed the switch because the switch was throwed there for one of the tracks in the yard—and just as I looked up he was [32] starting to cross the track.

(Testimony of John W. Cunningham.)

Q. From what direction to what direction?

A. From the south to the north. When I looked up he was just about to the middle of the track and just for an instant he was looking down in the yard, and I suppose he was getting the line up of the cars—I don't know what——

Q. He was looking toward you when you first saw him, is that correct?

A. No, he was looking north—just for an instant he turned his head down to the yard and when he straightened his head up—why just before he straightened his head up I got scared and I says 'them cars are going to corner him'—they were coming about six miles an hour—I had no way of telling how fast they were going—I had a head end view of the cars and before I could do a thing, or give him any warning, I was too far away—just as he turned around he seen the cars coming almost on top of him—he didn't have time to get out of the way—he throwed himself back and sideways, and as I recollect a draw bar hit him about in here—his right side——

Q. What happened to him?

A. It knocked him down right in the center of the track; as near as I could understand the first part of the trucks run over him.

Q. Did the wheels of the cars run over him?

A. Not that I saw.

Q. Did the cars pass over him?

(Testimony of John W. Cunningham.)

A. I don't know that either because when I run up [33] there he was on the outside of the track. How he got out there I don't know. The engineer on the regular switch engine he was working on had him in a sitting position when I got there.

Q. You saw him go under the cars?

A. I did.

Q. Where did the cars go then?

A. I don't *know* *became* of them—

Q. Did they go on the track that lead from that switch, from the lead track?      A. I think so.

Q. The switch had been thrown?

A. Yes.

Q. Did you, during the switching movement see Mr. Koefod?

A. I didn't see him before the accident.

Q. Did you see him give any signals?

A. No.

Q. You saw the cars with the engine attached to them, you saw them stop?

A. Before the accident, yes sir.

Q. And the way they were switching the cars, what direction was that in—were they going toward the west?

A. They backed up there, you know that would be East.

Q. First they backed up east?

A. Backed up east.

Q. Did they stop then in about twenty-five feet east of the switch?      A. Yes. [34]

(Testimony of John W. Cunningham.)

Q. Then when they made the switch in which direction did the cars move?

A. They moved west.

Q. Did you see them make the stop there?

A. They cut the cars off—the engine didn't move very far.

Q. Did you see them make that stop when they first came up from the East? A. Yes.

Q. They were standing there about how long?

A. Well, not very long.

Q. Can you estimate it? About half a minute?

A. That would have to be a guess. I might say ten seconds.

Q. You wouldn't know?

A. It was not very long.

Q. Did you hear any bell ring?

A. I did not.

Q. Did you hear any whistle? A. No.

Q. Could you have heard it that distance away if it had rung?

A. Well, where I was there was a lot of noise. I wouldn't be sure I could hear it, or not.

Q. You didn't hear it?

A. I did not.

Q. Your engine was standing? A. Yes.

Q. And there were no other engines switching around [35] in the yard at that time?

A. No.

Q. Except this one engine?

A. Except the one that was in use.

(Testimony of John W. Cunningham.)

Q. Now, the cars went on down into the yard?

A. Yes.

Q. Where did he cut them off from the engine, about?

A. The engine didn't go over the switch that was thrown.

Q. The cars did?           A. Yes.

Q. How fast were they moving about when they went over that switch?

A. I couldn't give you the exact estimate—I would judge about six miles an hour.

Q. Where did you see the engine after the cars had separated from it?

A. Right where they stopped.

Q. Did the engine start to move in any direction then?           A. No.

Q. It was standing there?           A. Standing.

Q. Did you go up to where the accident happened?           A. I did.

Q. Where was Mr. Owens lying when you got there?

A. He was in kind of a sitting up position.

Q. On what side of the track?

A. On the south side.

Q. What direction from that switch stand leading to the track—what position was he in from it?

[36]

A. He was a little bit below it.

Q. You mean east or west?           A. West.

Q. About how far?

(Testimony of John W. Cunningham.)

A. I couldn't say exactly—it would be a rough estimate.

Q. A few feet—six or seven or eight feet?

A. I would judge about eight feet.

Q. Where you saw him crossing in front of the cars was that right at the switch?

A. It was.

Q. In other words—

A. It would be a little bit west of the switch.

Q. He was going north? A. Yes.

Q. How far west of the switch?

A. Well, it wouldn't be exactly west of the switch—it would be just about at the switch where he walked across.

Q. Were you the first one to him?

A. I was not.

Q. Was any one there when you arrived?

A. I think Mr. Richards was there. He was the first one. The engineer on the switch engine.

Q. Did you get there next?

A. No, his fireman was there before I was.

Q. What was done with Mr. Owens? Did you notice any injury he had at that time?

A. I did.

Q. What was it? [37]

A. One leg was cut off pretty close to the hip.

Q. Which one?

A. I am unable to state that.

Q. Where was the other leg cut off?

A. It was cut off here.

(Testimony of John W. Cunningham.)

Q. You are indicating below the knee?

A. Yes. I tied up one of his legs——

Q. That was about two inches below the knee?

A. Well, I am not positive—I tied up one of his legs to stop the blood.

Q. Which one was that?

A. I am unable to state that. I believe it was the left one.

Q. It was the one that was the longer?

A. Yes.

Q. Was he bleeding at that time?

A. Not very much.

Q. Did he say anything to you?

A. Yes, he did.

Q. What was that? When was that—was it right at the time?

A. Yes. He said 'Don't bother, Bill, it isn't worth while'.

Q. What was done then with Mr. Owens after you tied his leg up?

A. I understood he was taken to the Sacred Heart Hospital.

Q. He was taken away from there?

A. Oh, yes. [38]

Q. Who took him away?

A. Why the police patrol, or whatever you call it.

Q. The ambulance?

A. Yes, police ambulance.

Q. Did you see Mr. Hinkle there at the time, the other switchman?

A. I did not.



(Testimony of John W. Cunningham.)

Q. Mr. Owens was conscious when you got there?

A. Yes.

Q. Was he conscious when they took him away?

A. As far as I know he was.

Q. The accident happened about 3:15 you say?

A. About that.

Q. How long a time elapsed between the time he was injured and the Ambulance took him away?

A. It was a very short time. I think under ten minutes. I couldn't say for sure.

Q. Was it wet around under foot at the switch?

A. It was a little soft. I wouldn't say it was wet.

Q. What is the ballast in the yard there?

A. It's gravel.

Q. Small gravel? A. Yes.

Q. Round gravel? A. Yes.

Q. Was there any whistle blown before that move was made with the cars?

A. I heard none.

Mr. Hanley: You may cross examine. [39]

### Cross Examination

By Mr. Hamblen:

Q. What were your duties that day?

A. I was on what you call the 'spot' to wait for the crew that was working there to get out of the way.

Q. What had you been doing up to that time?

A. Well, doing a lot of switching there. We had only been working a short time.

(Testimony of John W. Cunningham.)

Q. You were engaged in the same sort of work as the engine crew with which Mr. Owens was working? A. Well, practically.

Q. Did you say that was the first day you had worked there for some time? A. Yes sir.

Q. You were extra in there? A. Extra.

Q. You had worked there on the same work prior to that time? A. Oh, yes.

Q. And that was switching operations?

A. Oh, yes.

Q. You were familiar with switching operations? A. Yes.

Q. When you speak of the foreman, you refer to the engine foreman, do you? A. Yes.

Q. You had a foreman on your crew?

A. Yes.

Q. Who was that, Mr. Cunningham? [40]

A. Why his name was—he was a little short fellow—Hutley.

Q. What other men were on that crew, do you remember?

A. No, I don't hardly remember now.

Q. Well—if you don't remember. Now, about where was your engine located that has been referred to by Counsel as No. 7 lead, I believe, the switch where the accident took place?

A. Well, I was on 6 or 7 track down in the yard a ways with a lone engine.

Q. About how far west of this switch were you at that time?

(Testimony of John W. Cunningham.)

A. I would say in the neighborhood of six hundred feet.

Q. And your engine was headed west or east?

A. Headed west.

Q. You were sitting on the right hand side of the cab?

A. I was.

Q. On the north side of your engine?

A. Yes.

Q. At that time you were not engaged in any switching operation or movement, but waiting for the other movement to cease so you could go to work.

A. That's right.

Q. And prior to that time you had been switching?

A. Yes.

Q. I think you said you observed this particular train of which Mr. Owens was acting as foreman, come in and make several switches? [41]

A. Yes.

Q. Who handled the switches made by that crew?

A. Mr. Owens handled the switches.

Q. Were those switches on the north side of the track?

A. On the south side.

Q. And in making those switches, after he turned the switch he remained on the south side of the track?

A. He started across—

Q. I am not referring to this particular one.

A. He never crossed over that I know of.

Q. You saw him make the switches and you say he didn't cross over on any of those movements.

(Testimony of John W. Cunningham.)

A. Not that I saw.

Q. Now, I think you said you didn't hear any bell or any whistle. It wasn't customary in switching movements for engineers to ring the bell or blow the whistle, was it?

Mr. Hanley: That is objected to, if your Honor please, incompetent, irrelevant and immaterial. In the pleadings there is an admitted rule here that regulates the ringing of the bell and the rule states when the engine is about to move the bell must be rung. I didn't go into that on direct examination.

Judge Schwellenbach: The objection is sustained on the ground of improper cross examination. He didn't inquire as to any custom. He asked him whether the bell had been rung, or not.

Q. Mr. Cunningham, in making switching movements there did you at any time ring your bell or blow your whistle?

Mr. Hanley: I object to that on the same ground. Improper [42] cross examination.

Mr. Hamblen: The rule which counsel has referred to is not applicable, we so allege, in these switching movements, but when an engine is moving from a station or approaching a highway, and so forth. He went into the matter of whether the bell was rung, or the engine whistle blown, although he doesn't claim in his pleadings there was any rule in regard to an engine whistle—there is nothing alleged in the complaint in regard to that, and it seems to me we have a right to inquire whether or

(Testimony of John W. Cunningham.)

not that was done. Of course, later, when we come to the introduction of our testimony we will show that such a rule was not applicable.

Judge Schwellenbach: The objection is sustained as not proper cross examination, and on the further ground what this particular man may have done on any particular occasion is not binding so far as establishing rule or custom.

Q. Mr. Cunningham, you say you looked up there and you saw this engine and these cars come to a stop after they crossed this switch.

A. They were stopped.

Q. When you looked at them they were stopped.

A. Yes.

Q. You didn't see them cross the switch?

A. I did not.

Q. And you estimate the west end of the west box car was about twenty-five feet east of the switch.

A. That would be a rough guess. [43]

Q. That's your best judgment.

A. Just my opinion.

Q. Now, at that time, did you see Mr. Owens at the switch?

A. Not with that particular movement.

Q. When did you first see him at the switch?

A. When he started across the track.

Q. Now, can you state whether he started across the track right at the switch or some little distance west of the switch?

(Testimony of John W. Cunningham.)

A. It was a very short distance west of the switch.

Q. Could you say about how far west of the switch?

A. It would be a rough guess, probably six or eight feet.

Q. State to the jury what he did when you first saw him, the whole thing as you saw him.

A. Well, of that switch movement, of course, I didn't see it, but the first I see was just previous to the accident. He was in the middle of the track. His side was turned to the cars, and when I looked up I see the cars was pretty close to him. I had no time to give him any warning. I figured they were going to corner him when he turned then and I looked up, why he seen the cars and he had no chance to escape them. He threwed himself back like and the cars hit him and knocked him down resulting in the accident.

Q. Just for the purposes of illustration may we assume these two tables are the box cars, this being the west end of the west car, and assuming the switch was over here where [44] the chair is. Now, as I understand you saw him leave the switch and step over the south rail into the center of the track, is that correct?

A. Of course the switch would be further over that way.

Q. Well, then, further down this way——

A. Yes.

(Testimony of John W. Cunningham.)

Q. The end of the car when it stopped was about twenty-five feet east of the switch.

A. I would say so.

Q. He was at the switch and when you looked up you saw the cars coming down west toward the switch and you saw him step over just in front of the cars.

A. Yes.

Q. About how far was he from the west end of the car when you saw him do that?

A. Well, he wasn't very far, ten or fifteen feet I would say.

Q. And he didn't look at the cars when he stepped into the center of the track?

A. I didn't see him look toward the cars.

Q. If he had you would have seen him probably wouldn't you, watching him as you were?

A. Well, he might have looked before I looked up. I don't know.

Q. You didn't see him look up?

A. I did not.

Q. Was there anything there, Mr. Cunningham, to prevent his seeing the cars moving down toward him, if he had [45] looked?

A. No.

Q. If he had looked at any time from the moment he turned the switch and the cars started he could have seen them—there was nothing to obstruct his view. There was nothing to obstruct Mr. Owens' view from the time he turned the switch so far as moving cars were concerned?

A. No.

Q. In observing Mr. Owens after he stepped



(Testimony of John W. Cunningham.)

across the rail did you observe any apparent stopping on his part, Mr. Cunningham?      A. No.

Q. He just went right along without any stopping so far as you could see?

A. I seen none.

Q. I think you said the ground was a little damp from recent rains or something.

A. Just around the switch where the foot movement in throwing the switch.

Q. When you got to him you say that Mr. Richards and Mr. Seal were there with him?

A. Yes.

Q. And everything was done that could be done to aid him, was it?      A. Yes.

Q. And the ambulance arrived in your judgment within ten minutes of the time of the accident?      A. Yes.

Mr. Hamblen: I think that is all. [46]

### Redirect Examination

By Mr. Hanley:

Q. With reference to the other moves you had seen Mr. Owens make, I think you stated all of those switches were on the south side of the track he threw—that is, ahead of this last movement.

A. Yes.

Q. And what side of the engine are the signals given on?      A. The engineer's side.

Q. This engine was headed west.

A. West.

(Testimony of John W. Cunningham.)

Q. And the engineer would be on what side?

A. The right side.

Q. The south side?

A. No, the north side.

Q. But the signals are given ordinarily on the engineer's side if they can be given there?

A. Yes, if they can be given there.

Mr. Hanley: That's all.

#### Recross Examination

By Mr. Hamblen:

Q. I think you said you didn't see Mr. Koefod.

A. I didn't see him before the accident.

Q. As I understand now, assuming these two are the box cars, then the engine is on the east end with its front or pilot next to the east end of the east box car.

A. That's right.

Q. And the engine in backing up and putting the cars [47] over the switch was going west.

A. Yes.

Mr. Hamblen: That is all.

#### Witness Excused

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Whereupon Court adjourned to 1:45 P. M., at which time, all parties present the trial proceeded as follows:

O. S. KOEFOD,

a witness called and sworn, testified as follows on

Direct Examination

By Mr. Hanley:

Q. What is your occupation?

A. Switchman.

Q. And how long have you been a switchman?

A. It will be twenty-two years on the Union Pacific this coming fall. Prior to that I was on the Great Northern.

Q. Where are you working now?

A. With the Union Pacific.

Q. How long have you been working in Spokane?

A. Twenty-two years this coming fall.

Q. Do you know Mr. Owens, the plaintiff's decedent in this case?

A. Yes sir.

Q. How long have you been acquainted with him?

A. Since I hired out on the Union Pacific.

Q. On February 16, 1939, were you working with Mr. Owens?

A. Yes sir.

Q. What was he doing on that date? [48]

A. He was foreman of the 6:30 A. M. engine.

Q. You mean that's the time it went to work?

A. Yes, on February 16th.

Q. What time did your crew ordinarily leave work?

A. Well, we were supposed to be through at 3:30 P. M.

(Testimony of O. S. Koefod.)

Q. When you worked on beyond 3:30 P. M. why was that?

A. Well, that was over time.

Q. What yard were you working in on that date?

A. On the old yard.

Q. Where is the old yard, give briefly its limits.

A. Well, its between—I don't know whether the street just north of the old yard is Gardner or Dean It's off from Division Street and west of Division Street—I don't know just what——

Q. It runs as far as Washington Street?

A. It runs as far as Howard Street.

Q. What is the lead track through the yard?

A. The lead track? Well, there is really two leads. There is a lead that runs down toward the old main line, then there is a lead that leads off into 7, 8, 9, 12, on down that way.

Q. What did the crew consist of on February 16, 1911?      A. Mr. Richards——

Q. Who is he?

A. The engineer.

Q. Then the next member of the crew?

A. Mr. Seals, the fireman.

Q. Those two have charge of the operation of the engine? [49]      A. Yes sir.

Q. Who was in charge of the switch crew?

A. Mr. F. L. Owens.

Q. The plaintiff's decedent?      A. Yes.

Q. Which position did you occupy?

A. I was field man.

(Testimony of O. S. Koefod.)

Q. What were your duties, generally and briefly?

A. Well, I worked they called the field——

Q. You transmitted signals from time to time?

A. Yes sir.

Q. To the engineer to move the engine.

A. Yes sir.

Q. Who was the next member of the crew?

A. Mr. Hinkle.

Q. What position did he occupy?

A. He followed the engine.

Q. What were his duties?

A. He followed the engine around and he would help throw switches and help cut cars occasionally.

Q. His place was generally on the front board of the engine?

A. Yes, he was supposed to follow the engine.

Q. Would he transmit signals also?

A. Yes sir.

Q. Whom would you obtain signals from?

A. Well, that all depends.

Q. You worked under the direction of the foreman?

A. Yes sir.

Q. That would be Mr. Owens on this day? [50]

A. Yes sir.

Q. And the crew was in his charge and supervision?

A. Yes sir.

Q. On this day in question you recall Mr. Owens meeting with the accident which resulted in his death?

A. Yes sir.

(Testimony of O. S. Koefod.)

Q. Prior to that where had you been with the engine?

A. We had been down on the old main line in the old yard where we picked these cars up.

Q. What cross street is that close to? Is that close to Washington Street? A. Yes.

Q. And how does your tracks in the yard run, in what general direction?

A. East and West.

Q. What time of day about was it when this accident happened?

A. I believe it was about 3:15 P. M.

Q. What kind of a day was it?

A. Well, that I can't recall.

Q. Clear — or raining——

A. No, it wasn't raining. I don't remember just exactly what the weather conditions were.

Q. What switching had you done down in the yard close to Washington Street?

A. We sent out two cars to depot 5, two ahead to 6. Then we shoved the sixes on the old main line——

Q. Then what did you do?

A. We picked two up.

Q. Then what did you do? [51]

A. We took those cars to lead 13.

Q. When you say "lead"—how did you pick them up—and what was done—did you give the signal to move? A. Mr. Owens gave the signal.

(Testimony of O. S. Koefod.)

Q. He gave practically all of the signals, isn't that right?      A. Not necessarily.

Q. Didn't you repeat the signals he would give?

A. Yes.

Q. Now, you were down around Washington and he gave the signal to the engineer?

A. To back up.

Q. The engine was headed which way?

A. Headed west.

Q. Was the pilot on the engine coupled onto those two box cars?      A. Yes sir.

Q. What is the length of those cars?

A. Forty odd feet—they run about forty-one feet.

Q. Did you note the length of those two cars particularly, or are you giving your best recollection?

A. No, I believe they were forty feet cars. I am not sure but I believe they are forty-foot cars.

Q. That's inside the car. Forty feet inside?

A. Yes, I believe it is.

Q. Then you have about a foot for coupling on each car, is that right?      A. Yes sir.

Q. And the length of the two cars and coupling between [52] the two cars—

A. I believe there is a distance of about three feet between the two cars.

Q. Would that same distance be between the engine and the two cars?

A. Yes, approximately.



(Testimony of O. S. Koefod.)

Q. Then you have about forty-six feet without the engine? A. Yes.

Q. What is the length of the engine and tender, if you know?

A. Well's let's see. I should judge it would be probably 45 feet. I am not sure.

Q. You mean forty-five for the engine?

A. No, the engine and tank is what I am talking about.

Q. Now, Mr. Owen gave the signal to back up toward Division Street, is that correct?

A. Yes sir.

Q. You repeated it to the engineer?

A. No, I don't believe so.

Q. He was closer to the engineer?

A. No, Mr. Owens and I were standing together on the ground.

Q. Then what did you do?

A. We proceeded toward backing up the old main line.

Q. Did you get onto the cars?

A. Yes, sir.

Q. Did Mr. Owens get on the cars?

A. Yes sir.

Q. Where was he located? [53]

A. On the north side and west end of the car.

Q. Of the first car? A. Yes sir.

Q. You were located where?

A. On the east end and on the north side of the second car from the engine.

(Testimony of O. S. Koefod.)

Q. About three or four feet apart?

A. About three feet apart.

Q. The engine backed up, then, on what track?

A. Backed up the old main line.

Q. What you call sometimes the lead track?

A. Yes, sometimes.

Q. How far back did you go with reference to Division Street? How close to Division Street did you move the cars and engine?

A. Well, we were possibly four cars from Division Street.

Q. About 160 feet?           A. Yes, about.

Q. 160 to 180 feet.           A. Yes sir.

Q. Would that be the back end of the engine?

A. Yes sir.

Q. Where did you stop the cars with reference—is there a switch there leading in from the main line?

A. Yes sir.

Q. Is that sometimes called No. 7 switch?

A. Leads off into No. 7 track.

Q. You refer to this as No. 7 switch? [54]

A. No. Its a lead switch leading off into No. 7 track, or the main line.

Q. When you came up what was the position of that switch when you came toward Division Street?

A. It was closed for the main line.

Q. What do you mean by that?

A. Well the rail was lined for the main line.

Q. Was it so the cars and engine would pass over it?

A. Yes sir.

(Testimony of O. S. Koefod.)

Q. Then when the switch was thrown what was the position of it?

A. It would be lined for the one down 13, 7, 8, 9, 10, 11, on up to 13.

Q. Now, with reference to this switch you are just testifying to, about where did the cars stop?

A. I estimated seven or eight feet.

Q. That would be the west end of the west car?

A. Yes sir.

Q. How fast did you go with your engine and cars moving up to that point?

A. Oh, I couldn't say for sure—possibly ten miles an hour, I am not sure about that.

Q. Did any one as you reached this switch give the stop signal?

A. Yes sir.

Q. Who gave it?

A. Mr. Owens.

Q. Who did he give it to?

A. Give it to the engineer. [55]

Q. What side of the cars were you and Mr. Owens riding on?

A. The north side.

Q. On which side of the track is the switch located?

A. The south side of the track.

Q. What did Mr. Owens do before he gave the signal?

A. The stop sign, you mean?

Q. Yes.

A. He stepped off at the switch.

Q. He got off the moving cars?

A. He was hanging on the grab irons and one foot on the stirrup and he stepped off at the switch.

(Testimony of O. S. Koefod.)

Q. On the north side of the switch?

A. Yes.

Q. Did the cars go on by, then?

A. Yes sir.

Q. Then what did you do?

A. I stepped off just—when he gave the stop sign I stepped off. The cars had hardly stopped when I stepped off the stirrup and where I was hanging on.

Q. After he stepped off and the cars went by what did you see him do?

A. I saw him start across the track.

Q. Was your view then obstructed of him?

A. Yes sir.

Q. How was the track with reference to where you were located with reference to whether it was straight or a curve in it?

A. No. There would be a curve, a slight curve there. [56]

Q. From Division street does it turn south?

A. Then it kind of swings around to the north and west.

Mr. Hamblen: We have a map if that would help any.

Mr. Hanley: Yes, that would be fine and help the jury to understand what I am trying to get at.

Whereupon map marked for identification "Plaintiff's Identification A".

Mr. Hanley: We will offer this for illustration purposes only.

(Testimony of O. S. Koefod.)

Judge Swollenbach: It may be admitted.

Whereupon Plaintiff's Identification A becomes for all purposes of the record, Plaintiff's Exhibit A.

Judge Swollenbach: I find from years of experience that a jury understands a map better if they have the man who made it explain it first.

Mr. Hamblen: Mr. Davis who made the map is not here. I told him I would 'phone him when we came to our part of the case. I think counsel can explain it so it is perfectly clear. Mr. Hanley, I am willing for you to explain it to the jury.

Judge Swollenbach: (To the witness) Now, take a good look at this map first before starting to testify about it.

Q. (By Mr. Hanley) I will ask you then does that map fairly represent the ground area in that district you have been testifying about?

A. Yes sir.

Q. This is Division Street here.

A. Yes sir. [57]

Q. This runs north and south. A. Yes.

Q. And the track you have been calling the old main line, or lead track, is this it here?

A. Yes sir.

Q. It crosses Division Street up here.

A. Yes sir.

Q. Then the switch you have been testifying relative to is that it up here? A. Yes sir.

(Testimony of O. S. Koefod.)

Q. That switch leads evidently to track 13?

A. Yes sir.

Mr. Hamblen: You might mark it with a colored pencil—mark it with a cross in red.

Q. Then when you pulled up and stopped the end of the cars, how far did you testify that was from the switch?

A. It was around seven or eight feet.

Q. And then, Mr. Owens, I think you testified, got off on this north side of the switch?

A. Yes sir.

Q. And you got off—could you take a pencil and make a mark about where you got off?

A. I don't know just exactly—I should judge that would possibly be eight feet over the switch. Then I was on the grab iron—I possibly got off up about in here some place.

Q. How far away would that be from the end of the car, the west end of the west car where you got off?

A. That would be almost forty feet. [58]

Q. Can you make a little cross there where you got off.

Judge Schwellenbach: Put the letter "K" there.

A. I would judge it would be along in here, I ain't just sure.

Q. Then engine and cars then stopped.

A. Yes.

(Testimony of O. S. Koefod.)

Q. You saw Mr. Owens cross the track in front of the cars? A. Yes sir.

Q. Did you have a view of the switch? Could you see the switch at that time?

A. No, sir.

Q. Or at any time before the cars subsequently moved? A. No sir.

Q. The engineer was on which side?

A. He was on the north side.

Q. Was there anything that would obstruct his view of the switch or of Mr. Owens?

A. Yes sir.

Q. What would?

A. The switch was on the south side.

Q. Of the track? A. Yes.

Q. Would there be anything there obstructing the fireman's view on the south side of the engine?

A. Yes, I believe it would on account of the curve there.

Q. His view would be obstructed between the position [59] he occupied in the engine and the switch.

A. Yes, I don't believe he could see the switch stand—

Q. Then from Division Street you believe you were about four car lengths.

A. Yes, I would judge about four car lengths.

Q. 160 to 180 feet.

A. Something like that.



(Testimony of O. S. Koefod.)

Q. That would be the back end of the tender.

A. Yes.

Q. How long were the cars stopped there?

A. Well, just long enough for me to—I didn't have a view of the switch point from where I stepped off—

Q. What do you mean by "switch point"?

A. The switch point on the rail.

Q. Could you point to it here for the jury's benefit?

A. For instance, when the switch is lined for 13 the point of the rail is against this rail here, or if the switch is lined for the main line the point of the rail would be against this track here.

Q. Getting back to my question, the switch points are located right at the switch?

A. Right at the switch.

Q. And the points are supposed to clamp against whatever track they are thrown for?

A. Yes sir.

Q. I understood you to say you moved from here—where did you go to?

A. Well, I stepped out to a point approximately, possibly 20 feet. [60]

Q. That would be out from where you got off?

A. Of course, the cars hadn't hardly stopped when I got off, but we were—I presume the end of this west car was possibly up here. The car went by me a little when I stepped off and it obstructed the

(Testimony of O. S. Koefod.)

view. Then I stepped out to a point where I could see when Mr. Owen lined the rail.

Q. You couldn't see him throw the switch?

A. No sir.

Q. Can you make a mark 20 feet out where you stepped out?

A. I don't know how to figure 20 feet on this map. I got out to where — 20 feet from the rail to where I could get a view.

Q. How far were you from the engineer there?

A. Well, I should judge I was about sixty-five feet from—oh—from the engineer? That would probably be close to eighty-five or ninety feet. I couldn't say for sure. I imagine it would be something like that.

Q. The engineer had brought the cars to a dead stop?      A. Yes.

Q. He had to reverse his engine?

A. Yes sir.

Q. Which way were you going to switch the cars?      A. The cars were going down 13.

Q. Going to be switch west?

A. West, yes sir.

Q. That would be in the reverse direction from the way you had been moving coming up to the switch. [61]

A. Yes sir.

Q. Did you get the signal from Mr. Owen when the switch was thrown?      A. No, sir.

(Testimony of O. S. Koefod.)

Q. Did you give a signal to the engineer to move the cars?      A. Yes sir.

Q. What kind of a signal was it?

A. I gave the kick signal—

Q. Describe that in words? What would it be like?

A. Of course I am a southpaw—(witness gives signal with hand). That's the way I gave it to Richards.

Q. What did the engineer do?

A. He acted on my signal.

Q. Where was he when you gave him this signal?

A. At this point here—I can't say how far it would be when I gave him the signal. I don't know how far I walked toward the engine when I gave him the signal.

Q. Did you walk in toward the track?

A. No, I believe I walked directly toward the engine. I walked at sort of an angle I believe.

Q. He started the cars then in response to the signal?      A. Yes.

Q. Which way did the cars and engine move?

A. West.

Q. You don't know how close you were when you gave the signal?

A. I am not positive how far I walked when I started to walk toward the engine. [62] I am not positive how far I walked when I gave the signal. Maybe the engineer could tell you about that.

(Testimony of O. S. Koefod.)

Q. Before you gave the signal then you didn't see where Mr. Owens was? A. No sir.

Q. Nor did you see the switch stand and switch target move? A. No.

Q. You didn't see either one move?

A. No sir.

Q. Was any bell on the engine rung?

A. No.

Q. Was there any bell rung just before you started to move? A. No sir.

Q. Did any one give any warning of any kind at all to Mr. Owens, holler to him, or anything?

A. No sir.

Q. What did you do then after you gave the signal for the cars to go west?

A. I cut the cars off.

Q. Where did you make the cut?

A. Just about—oh, let's see—I would have to figure that out. I should judge the engine moved about twenty feet when I cut them off, when I pulled the pin—probably moved more than that—possibly thirty—and I suppose the engine moved about forty feet altogether, but after I pulled the pin it possibly moved ten feet after that. [63]

Q. What do you mean by "pulling the pin"?

A. Pulling the pin lifter on the engine.

Q. Is that done with a lift lever?

A. Yes, sir.

Q. You pulled it on the engine?

A. Yes sir.

(Testimony of O. S. Koefod.)

Q. Then what did you do?

A. I gave the signal, back up sign and Pendleton sign.

Q. Just show what the back up sign is.

(Witness demonstrates)

Q. That's the reverse of the proceed sign.

A. Yes.

Q. What do you mean by the "Pendleton sign"? Show us what you wanted the engineer to do by the Pendleton sign.

A. When I cut the cars the engine was possibly along in here, and I gave him the sign to back up here to Division Street and we were going to head down on the Pendleton track—this track right here——

Q. You had some special sign for the Pendleton track? A. Yes sir.

Q. The engineer would understand that?

A. Yes sir.

Q. Did he back up then?

A. I can't recall, as to whether he backed up or whether he did move the engine—I can't recall that—I gave him the back up sign and Pendleton sign and stepped on the foot board.

Q. That's the pilot foot board of the engine?

[64]

A. Yes sir.

Q. Where did the two cars go?

A. They went down toward 13.

Q. Do you know how fast they were moving down the line?

(Testimony of O. S. Koefod.)

A. Well, just when I cut them off, they were going between five and six miles an hour.

Q. Did you run along side the cars to cut them off? A. Yes sir.

Q. You were not on the foot board of the engine? A. No sir.

Q. Did the cars go on down on the 7 track toward 13? A. Toward 13.

Q. When did you see Mr. Owen?

A. After I had stepped on the foot board—there was a man walking toward Division Street on the south side of the track and he called my attention and I looked over toward him and he pointed west or down toward the—I thought he was pointing toward the yard office, the way it looked to me, and I didn't know what his meaning was, only that he pointed down and I turned around at the time and looked down toward the yard office.

Q. Did you see Mr. Owens?

A. Then I saw Mr. Owens lying on the south side of the track.

Q. About how far from the lead switch?

A. I don't recall for sure, but it seems as though it was about seventeen feet. I am not positive of that.

Q. Was part of his body on the track?

A. Yes, I believe that—I ran up to Owens and saw [65] that he had been run over.

Q. Were you the first one there?

A. I was the first one there.

(Testimony of O. S. Koefod.)

Q. And the fore part of his body, the head and trunk?

A. That was lying south of the tracks.

Q. And his legs?

A. I can't swear to the position of his legs at the time—because I ran up to him and I saw he had been run over, and I immediately ran to the yard office as fast as I could go for help.

Q. Who came up while you were there?

A. The yard master left the yard office immediately.

Q. Did you leave anybody in charge of him?

A. Mr. Richards noticed there was something wrong when he saw me run up to Mr. Owens.

Q. Did he go then, or did you see him go toward Mr. Owens?

A. Well, I can't say I did. I know I was running toward the yard office as fast as I could go. I don't believe I did see Mr. Richards come down off the engine.

Q. You repeated the sign Mr. Owens gave to the engineer to stop—I think I have asked you that. He had control of it and gave the signals himself for the movement of your yard movements.

A. Not necessarily.

Q. I am asking you about what happened here at this accident. He gave the signals to stop?

A. Yes, he gave the signals to stop.

Q. And also gave the signal down below to start. [66]

A. Yes.



(Testimony of O. S. Koefod.)

Q. You were working under his supervision?

A. Yee sir.

Q. Did Mr. Owens say anything to you when you to him?

A. No sir. I was so excited he didn't have time to say anything to me. I ran as fast as I could.

Q. The way you handled that move is what you call "kicking" the cars? A. Yes sir.

Q. What is the difference between that and just the ordinary move—if you can explain it.

A. You mean shoving and kicking?

Q. Yes.

A. Well, 'kicking' cars is when you pull a drag of cars out you kick them toward the different tracks—first you make your cuts and then kick them toward the different tracks. When you shove cars, well—you just shove with the engine. You don't cut them off.

Q. Now, do all of the crew look out for each other when switching? A. Yes sir.

Q. You try to see where everybody is at all times? A. Yes sir.

Q. And the operations are made with the coordination of signals one from the other, isn't that correct?

A. Sometimes signals and sometimes instructions are given out verbally.

Q. Everybody understands in plain English what is going to be done? A. Yes sir. [67]

(Testimony of O. S. Koefod.)

Q. Now, had Mr. Owens said anything to you about these cars on the way down?

A. Yes sir.

Q. What did he say?

A. He said 'Let these go 13, come against Pendleton and get the first one'.

Q. That's all that was said?

A. With reference to the work.

Q. When you gave this kick signal you didn't know whether the switch had been turned over properly or not with the handle?

A. Not as far as the handle was concerned.

Q. You couldn't see that at all, could you?

A. No, sir.

Q. The dropping of the handle on the switch is what locks the points against the other rails, is that true?

A. Yes sir.

Q. If that handle is not dropped the switch isn't completely thrown, is that correct?

A. Well, you mean when the handle is taken out and pulled——

Q. That's right—and dropped into another notch.

A. The rail is lined when it is pulled over.

Q. The throwing of the switch isn't complete until that takes place, is it?

A. We generally watch the rail to see the point of the rail is lined.

Q. You have no way of knowing unless you see the switch actually thrown and the handle dropped down? [68]

(Testimony of O. S. Koefod.)

A. You could see the switch point lined against the rail. Of course we generally figure when we see the point of the switch lined and the man at the switch stand——

Q. You didn't know Mr. Owens was at the switch stand, did you?

A. I supposed he was.

Q. He went across in that direction and that's the last you saw of him? A. Yes.

Q. But you didn't know whether he had completed throwing the switch?

A. Only when I saw the point at the rail.

Q. You didn't positively know.

A. I didn't see the switch stand.

Q. Nor Mr. Owens? A. No sir.

Q. The hand signals you have given, they are detailed in the book of rules of the company?

A. Yes sir.

Q. You follow what the rules provide in giving signals, do you? A. Yes sir.

Q. You give hand signals in the day time and lamp signals by night? A. Yes sir.

Q. You didn't get any proceed signal from any one at all before you gave it, did you?

A. No sir.

Mr. Hanley: You may examine. [69]

#### Cross Examination

By Mr. Hamblen:

Q. Mr. Koefod, I think you stated you had worked for the Union Pacific some twenty-two

(Testimony of O. S. Koefod.)

years.       A. Yes sir.

Q. How long had you worked with this crew of which Mr. Owens was foreman?

A. The last time I worked with Foreman Owens we worked together about four months, I believe, or a little more.

Q. Had you worked with him previously?

A. On and off for twenty years.

Q. You were familiar with his manner of giving signals and the manner of giving instructions, is that correct?       A. Yes sir.

Q. Now, as I understand it, on the day of this accident you had come down here onto one of these lead tracks and picked up two cars, is that right, intending to back up—

A. We came down the main line.

Q. And your engine was headed west toward these cars, is that right?

A. Yes sir, we were away down in here where we picked up the cars.

Q. Then the engineer backed up pulling those cars down toward Division Street and came up here on the main line, is that correct?       A. Yes sir.

Q. At that time you had these two cars? [70]

A. Yes sir.

Q. Now, as you came East toward Division street, the engine was headed this way—(illustrating)—is that correct, toward the two cars?

A. Yes sir.

Q. And backing up East this way.

A. Yes.

(Testimony of O. S. Koefod.)

Q. As I understand Mr. Owens was standing at the west end of this first car, the car next to the engine.

A. Yes, Mr. Owens was on the west end of the north side of the car next to the engine.

Q. Then, as I understand you, you were right next to him on the other car, is that right?

A. Yes sir.

Q. I think you stated he was in charge of the work there that day.

A. Yes.

Q. And I think you testified as you backed up toward this lead switch with these two cars, you on one car and Owens on the other, he gave you instructions with reference to what to do with these cars.

A. Yes.

Q. Repeat what the instruction was.

A. He told me 'let these go 13 come against the Pendleton and get the first one'.

Q. What did that instruction mean, Mr. Koefod?

Mr. Hanley: That is objected to, if your Honor please, as calling for an opinion and conclusion of the witness. All he can do is give his own [71] understanding of it. The language is plain English language and speaks for itself.

Mr. Hamblen: I would be glad to reframe my question.

Q. What was your understanding of that instruction, Mr. Koefod?

Mr. Hanley: I object to it on the same ground. The language speaks for itself.

(Testimony of O. S. Koefod.)

Judge Schwellenbach: The objection is overruled.

Q. You may answer what you understood Mr. Owens to mean by that instruction.

A. I should let those cars go 13.

Q. What does that mean?

A. Let the cars go in toward No. 13 and we should back up to Division and head down on the Pendleton and get the first one.

Q. And bring it back? A. Yes.

Q. What did that instruction mean with reference to letting those two cars go 13 with reference to kicking those two cars, or not?

A. Well, that's the way Owens generally told me if he wanted me to let the cars go, he would say 'let that car go at so and so'.

Q. Describe a little further what is meant by 'kicking' as distinguished from 'shoving'.

A. Well, kicking—use your own judgment about the speed and the man on the ground gives the engineer the kick sign, then when you figure its going fast enough you signal the engineer down and pull the pin. [72]

Q. In 'shoving', I think you said, the engine remains coupled to the cars and pushes or shoves the cars whichever way they are going.

A. Yes.

Q. When you came up on those cars he gave you those instructions 'let them go 13 come against Pendleton and get the first one'.

(Testimony of O. S. Koefod.)

A. Yes sir.

Q. And you came up across this lead switch and Mr. Owens dropped off first about at the switch.

A. Yes.

Q. And as he dropped off he gave the stop signal to the engineer.

A. He dropped off at the switch then he went on up to where the west end of the west car was, about over the switch, then he swung us down.

Q. He waited until——

A. The car was over the switch.

Q. Then he gave the stop signal?

A. I believe it was about the time the cars were passing over the switch he gave the stop sign.

Q. At that time he was on the north side of you?

A. Yes.

Q. You were all on the north side, you and Owens and the engineer?

A. Yes.

Q. And the signals are given on the engineer's side, is that correct?

A. Yes. [73]

Q. With that instruction from Owens, as I understand it, then you moved on up a ways and dropped off at the place marked 'K'?

A. Yes.

Q. Then you stepped out north, approximately twenty feet you say.

A. Approximately twenty feet.

Q. To a point where you could see the switch points.

A. Yes.

Q. Are they clearly visible from that location?

A. Yes, they were.



(Testimony of O. S. Koefod.)

Q. You had no difficulty seeing them change when the switch was changed? A. No.

Q. Did you see them change? A. Yes.

Q. Did it turn out the switch had been properly thrown? A. Yes sir.

Q. And the cars went on down over the switch toward 13 track, is that correct?

A. Yes sir; well--now, I didn't look at the switch. When I ran to where Mr. Owens was I couldn't swear to that because I didn't inspect the switch after we kicked the cars.

Q. But the cars did go on down 13 lead, is that correct? A. Yes.

Q. Now, was there anything in that movement any different from any similar movement you have been conducting in recent days? [74]

Mr. Hanley: Object to that as improper cross examination, irrelevant, incompetent and immaterial.

Mr. Hamblen: I remember that Mr. Hanley went into the practice of giving signals here.

Judge Schwellenbach: I think he did much more so than he did with the first witness. However the question was there anything different in this operation than operations had during previous days doesn't seem to me to establish anything and I will sustain the objection.

Mr. Hamblen: Allow us an exception, please.

Q. I will get at it this way: had you been conducting similar operations to this one?

(Testimony of O. S. Koefod.)

A. Yes sir.

Q. With Mr. Owens? A. Yes sir.

Q. Under similar instructions?

A. Yes sir.

Q. Had you always carried them out in substantially the same way? A. Yes sir.

Q. This operation on this day under oral instructions given to you by Mr. Owens was carried out no differently from the usual way.

A. Yes.

Q. As I understand it, then, it was the practice, was it, to accept any instruction from the foreman as to how they should conduct any operation that was being conducted? A. Yes sir.

Q. And you did follow Mr. Owens' instructions.

[75]

A. Yes sir.

Q. The rule requires the man on the engineer's side to give the hand signals, is that correct, to proceed or whatever the signal may be, wherever it is practicable?

A. A man should where it is practicable. Of course a man can give the signals on the fireman's side if they are in a position—

Q. But in this situation where the fireman's view was cut off from the switch it was proper for the man on the engineer's side to give the signals?

A. Yes sir.

Q. Mr. Koefod, is there anything in the rules, or otherwise, requiring all signals or instructions

(Testimony of O. S. Koefod.)

to be given by the foreman by hand, that is, to the other members of the crew?      A. No sir.

Q. Now, after you had given the kick signal which you have referred to, and after you turned toward the engine and stepped on the foot board on the front of the engine your attention was then attracted, as I understand it, by a bystander to the fact that something had happened.

A. Yes sir.

Q. And you turned around, and ran toward the switch, is that right?

A. I didn't understand what the man meant when he first called my attention and pointed toward the yard office. I didn't know right at that time until after the cars had passed on down.

Q. After the cars had passed by then you were able to [76] see Mr. Owens lying by the switch?

A. Yes.

Q. And you ran up and saw he was hurt.

A. I ran up to foreman Owens and then I saw he had been injured, run over. Then I immediately ran to the yard office as fast as I could.

Q. And gave instructions to secure help.

A. Yes sir.

Q. Mr. Koefod, would you be able to say about how many switching operations your crew had made that particular day?

A. No, I couldn't tell how many.

Q. Can you give an approximation or estimate?

A. That is, you mean down on the lead or the total amount—

(Testimony of O. S. Koefod.)

Q. In the switching yards.

A. Oh, I really don't know. We must have made a lot of them.

Q. Would you say fifty or a hundred?

A. Oh, yes.

Q. More than that? Two hundred?

A. Well, I wouldn't be surprised but what we probably handled two hundred cars. I don't know how many.

A. Let me ask you this: in any of those movements in which the movement was confined to the switching yard was the engine bell rung or whistle blown?

Mr. Hanley: To which I object on the ground it's incompetent, irrelevant and immaterial.

Judge Schwellenbach: (To the Jury) Gentlemen: [77] I am going to permit this question to be answered. Later, during the course of the trial, or as part of the instructions I will instruct you as to the effect, or lack of effect, of the ringing of the bell or the blowing of the whistle, and you will follow those instructions as to the effect of that testimony. It is a matter which I think the jury could easily separate from the other testimony under proper instructions, and I will permit the question to be asked at the present time.

Question Read: 'Q. Let me ask you this: in any of those movements in which the movement was confined to the switching yard, was the engine bell rung or whistle blown?'

(Testimony of O. S. Koefod.)

A. That all depends on where you are working. For instance, in the old yard if you are moving, switching and moving over Washington Street, or Division Street or Howard Street the signal bell is rung.

Q. That is for the benefit of the crossing public?

Mr. Hanley: That is objected to.

Judge Schwellenbach: And the objection is sustained and the jury instructed to disregard the question or any implication in it.

Q. Now, getting back to my question. Within the limits of the yard, except the crossing of the streets, in any of those operations is the bell rung or whistle blown?

A. Switching up there on the lead, when we don't use the crossing, or cross a street, we don't use the bell or the whistle.

Mr. Hamblen: That is all the cross examination.

### Redirect Examination [78]

By Mr. Hanley:

Q. Now your book of rules regulates the signals you give, isn't that true?      A. Yes sir.

Q. I hand you plaintiff's Exhibit B for identification and I will ask you what that is, if you know.

(Witness reads from Identification B) 'The Rules herein set forth govern the railroads operated by the Oregon-Washington Railroad and Navigation Company. They take effect September

(Testimony of O. S. Koefod.)

1st, 1920, Superseding all previous rules and instructions inconsistent therewith'.

Q. Will you identify what this book is.

A. That's a book of rules.

Q. Was that book of rules in effect on February 16, 1939, or a later book——

A. Yes sir.

Q. Do you know when that went into effect? Let me put it this way. Was that book of rules in effect until superseded by a later book of rules?

A. Yes sir.

Q. I hand you here——

Mr. Hamblen: Counsel will admit that the book of rules you have identified there, Plaintiff's Exhibit B, is the book of rules in force and effect at that time, the time of the accident.

Mr. Hanley: Then I wish to offer the book in evidence.

Mr. Hamblen: I don't think the whole book should go in. If you want to call his attention to any particular [79] rule——

Mr. Hanley: I want it to go in evidence for the purpose of showing whether there was or was not any restriction on the use of the bell.

Mr. Hamblen: If your Honor, please, he has alleged a certain definite rule in regard to the use of the bell, I think it's rule 30. We are not going to object to the introduction of that rule, but to introduce the whole book and make it a part of

(Testimony of O. S. Koefod.)

the record it seems to me is improper, and improper to make an exhibit of the whole book.

Judge Schwellenbach: Is it any different from, say for example, a traffic ordinance. You plead the violation of certain traffic ordinances, and then you bring in certified copies of those particular portions you say are violated. You do not put in the whole traffic ordinance. You allege they have violated certain rules. I think there would be no objection if you wanted to copy the portions that you have pleaded, and put them in as exhibits so the jury could have them as exhibits to examine the same as they could examine certified copies of a particular portion of the traffic ordinance. I don't think you should put in the whole book.

Mr. Hanley: He was interrogated, as I understand it, your Honor, on the question of his understanding, and so forth, and he also testified they were governed by the book of rules. Then he testified he saw the switch points go over. I would like to use the book of rules and have him point out to me a rule in that book, if there [80] is any such rule, whereby the signal of the switch points going over is a rule by which he works.

Judge Schwellenbach: I would sustain an objection to that kind of testimony, Mr. Hanley. There is no contention there is any such rule, and I don't think you can cross examine your own witness now upon the question and try to impeach his testimony.



(Testimony of O. S. Koefod.)

Mr. Hanley: I couldn't without the court's permission, I understand that. But he is an employee and he is somewhat, I think at least, an adverse witness.

Judge Schwellenbach: I see nothing in his attitude to indicate that.

Q. I will ask you this: you stated that all Mr. Owens said to you was to let the cars go 13, and you understood that to mean those cars were to be kicked into 13 from that statement 'let the cars go 13'. Then I think you said 'cross over to the Pendleton track'. A. Yes.

Q. Let me ask you this: in the book of rules you have a proceed signal. A. Yes.

Q. And this is defined in your book of rules as a signal by the hand. A. Yes.

Q. You give that when you want them to go ahead. A. Yes, sir.

Q. You had to give the signal then to move the engine. A. Yes sir.

Q. Had to give the kick signal. [81]

A. Yes sir.

Q. There was nothing in that statement to you by Mr. Owens to let those cars go 13 that meant you should dispense with any necessary signal for that move, was there, or was there not?

A. I don't get—understand the question.

Q. Well, it was your duty under your signal rules to still follow the signal rules regardless of

(Testimony of O. S. Koefod.)

that remark to you, isn't that true? The fact that he said 'let them go 13' didn't tell you to eliminate any necessary signals for that movement?

A. Ordinarily when he wanted me to let them go that's the way *in* informed me. He just said let those go so and so.

Q. That's all he said to you?

A. Nothing else in regard to that particular movement.

Q. Wouldn't the proper practice have been to have gotten the signal from him before you made the move?

A. Not necessarily.

Q. What do you mean by that?

A. Well, the way we worked, for instance, in the old yard—now, for instance, if we were down in the yard and going to pull some cars over those switches—we would pull over this same track or switch, say they were going to make the main line 6, 7 or 8, he would give me 5 or 6 track signal and I would cross over here (indicating on map (Exhibit A)), and we were going to make it main line 5 and 7, I would walk over and throw the switch and stay over on the south side of the track, I wouldn't [82] cross back over.

Q. Wouldn't the safe practice be to have waited when he was out of your sight—the switch stand was out of sight—while you saw the switch points go over you didn't see them thrown—wouldn't the general practice have been, and the proper practice, to have waited until he crossed

(Testimony of O. S. Koefod.)

back across the track and got the signal from him to start the cars—wouldn't that have been the proper practice?

A Of course, according to the way we worked over there, as I stated, the man that walked across to throw the switch he stayed over there and you generally could figure on—anybody that worked there for a number of years they would stay on this side Of course, a student——

Mr. Hanley: I object to what a student would do. A. You would have to watch——

Question Read: 'Q. Wouldn't the safe practice be to have waited when he was out of your sight—the switch stand was out of sight—while you saw the switch points go over you didn't see them thrown—wouldn't the general practice have been, and the proper practice, to have waited until he crossed back across the track and got the signal from him to start the cars—wouldn't that have been the proper practice?'

Mr. Hanley: I would like to have him answer 'yes' or 'no', then he can make his explanations.

Judge Schwellenbach: I think his answer shows he can't answer 'yes' or 'no'. You joined two elements, proper practice and safe practice. 'Safe' might be [83] in the light of what occurred, or 'safe' in the light of knowledge you now have. 'Proper' practice is the question you should ask him.

(Testimony of O. S. Koefod.)

Q. Wouldn't that have been the proper practice?

Mr. Hamblen: Isn't it the usual practice we want to get at here. I don't object to the 'usual' practice.

Q. Supposing you had been shoving those cars instead of kicking them——

Mr. Hamblen: That is objected to as an improper question. There is no contention they were shoved——

Judge Schwellenbach: Objection sustained.

Q. Wasn't it, Mr. Koefod, the usual and customary practice under circumstances like existed there where Mr. Owens was out of your view, out of view of every one and so was the switch, wasn't it the usual and customary practice for you to have gotten the signal from him before you moved those cars?      A. No sir.

Q. Does that ever happen in the yard under those circumstances, would that ever happen?

A. With the understanding I had I should let those cars go thirteen and come against the Pendleton with the first one——

Q. You weave your understanding from just what he said to you, is that it?

A. Yes, many times.

Q. And Owens handled it the same way without keeping you in his sight.      A. Yes sir.

(Testimony of O. S. Koefod.)

Q. He would give the proceed signal when the switch points were lined up. A. Yes sir.

Q. The operation of that crew was under the supervision and direction of Foreman Owens?

A. Yes sir.

Q. He gave the signal to start below and gave the signal to stop. A. Yes sir.

Q. You want to be understood it wasn't the usual and customary practice to get the signal from him to start again because he said 'let those two cars go 13'. A. Yes sir.

Q. You want definitely to go on record on that?

A. That is usually the way that Mr. Owens would tell me. For instance, if he wanted to let the cars go he would say 'let those cars go so and so and come so and so', that is when he threw the switch. That was the understanding he would throw the switch.

Mr. Hanley: That is all.

### Recross Examination

By Mr. Hamblen:

Q. In other words, Mr. Koefod, when you have a verbal instruction from the engine foreman and you find the switch points lined up it isn't necessary to get further hand signals from him.

A. No, we would never wait for another hand signal to proceed or go ahead. [85]

Q. As I understand you have handled this same operation in a reverse position with Owens, that is,

(Testimony of O. S. Koefod.)

you handled the switch and Owens waiting until the switch points lined up.

A. Yes, many times.

Q. And Owens handled it the same way without keeping you in sight? A. Yes sir.

Q. He would give the proceed signal when the switch points were lined up. A. Yes sir.

Mr. Hamblen: That's all.

Witness Excused

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Whereupon

Court recessed for five minutes, after which time the trial proceeded as follows:

H. H. CHAPMAN,

a witness called and sworn testified as follows on

Direct Examination

By Mr. Hanley:

Q. Your name is H. H. Chapman?

A. Yes sir.

Q. Where do you live?

A. 2525 Gardner, Spokane.

Q. How long have you lived here?

A. Thirty three years.

Q. What is your occupation at the present time? A. Retired.

Q. What did you retire from?

A. Switching [86]

Q. On what date did you retire?

(Testimony of H. H. Chapman.)

A. I don't remember the exact date. It was early summer in 1937.

Q. The summer of 1937? A. Yes.

Q. In whose employ had you been?

A. The Union Pacific.

Q. Yard or road service?

A. Yard service.

Q. Whereabouts were you working in yard service? A. In Spokane.

Q. In the yard? A. Yes.

Q. Did you ever work in the yard between Washington and Division Street?

A. Yes sir.

Q. When you say the Spokane yard you mean the entire yard?

A. Yes, I have worked all over.

Q. Will you look at this map here, Plaintiff's Exhibit A. Do you recognize that as part of the yard?

A. Yes. They have put in two or three tracks there since I have retired.

Q. That lead track is the same as when you were there? A. Yes.

Q. How many years were you employed in the Spokane yard?

A. I went to work there in 1910.

Q. Did your employment continue up to 1937?

(Testimony of H. H. Chapman.)

A. Yes.

Q. In what capacity did you serve?

A. Engine foreman, helper and yardmaster.

Q. I will ask you what was the custom and practice in that yard when you worked there with reference to the engine crews working together—whether or not each member—I should say switching crew working together—what was the practice of members of the crew looking out for each other?

Mr. Hamblen: We object to that because it is some time prior to the time this accident happened. I don't object if he brings it up to the time of the accident.

Judge Schwellenbach: (To Mr. Hanley) I will hear from you.

Mr. Hanley: I can't show beyond 1937, but this man worked for some twenty odd years in this yard, up to '37, and I want to show by him what the custom and practice was during the time he worked there. Its my position he is not only qualified to testify as to what the custom and practice was in '37, that is two years before this accident happened, the early summer, less than two years, but also he should be qualified as an expert to state what would be the customary and usual practice in this territory with reference to this particular switching operation, that is, with a hypothetical question. I can ask him what the practice was up to '37, thats as close as I can make it with this



(Testimony of H. H. Chapman.)

witness. I think its a matter of discretion with the court.

Judge Schwellenbach: That the practice was the same in [88] 1939 as in 1937?

Mr. Hanley: If I can withdraw this witness and put on another witness I think I can connect that up.

Judge Schwellenbach: I think you should.

Whereupon Witness excused temporarily.

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E. B. HINKLE,

a witness called and sworn, testified as follows on

Direct Examination

By Mr. Hanley:

Q. Where do you live?

A. 2514 West Euclid.

Q. How long have you been employed by the Union Pacific?

A. About twenty two years.

Q. What has your employment been?

A. Well, I was first hired at Cheney as a section foreman there in 1918, then I was transferred in 1920 to yard service as switchman.

Q. And you have been in the Spokane yard since 1920 up to the present time?

A. Yes sir.

Q. In what capacity?                      A. Switchman.

Q. The book of rules that went into effect in

(Testimony of E. B. Hinkle.)

1920 was that in effect up to the time it was superseded by a new book of rules?

A. I think this new book of rules went into effect in May. [89]

Q. What year? A. 1939.

Q. And the book effective September 1st, 1920, that governed the operation of the yard and the trains and so forth up to the time the subsequent book went into effect? A. Yes sir.

Q. During your period as switchman in the Spokane yards was there any change of any kind with reference to practice, customs and usages with reference to switching cars between the years 1937 and 1939, up to and including February, 1939?

A. No, there hadn't particularly been any change of any kind that I know of.

Q. Had your methods and customs and practices been all the same from the time you went to work in the yard and switching cars up to the present time? A. Yes sir.

Mr. Hanley: You may cross examine.

#### Cross Examination

By Mr. Hamblen:

Q. You worked under different foremen, have you, in the switching yards? A. Yes sir.

Q. Did all the foremen have the same method of giving signals and so forth?

A. Practically all the same I have worked with.

Mr. Hamblen: I think thats all. [90]

Whereupon

H. H. CHAPMAN,

recalled, continued on direct examination to testify as follows:

Mr. Hanley: I'll ask the reporter to read the last question to Mr. Chapman just before he left the stand.

Question Read: 'I will ask you what was the custom and practice in that yard when you worked there with reference to the engine crew working together, whether or not each member, I should say switching crew, working together—what was the practice of the members of the crew looking out for each other?'

Q. Do you know what that practice was?

A. Well, they all kind of took care of one another to a certain extent.

Q. When the switchman was out of sight would you, before making the move——

Mr. Hamblen: That is objected to as leading, if your Honor please.

Judge Schwellenbach: Objection sustained.

Q. What would you do when the switchman was out of sight?

A. I kind of like to know somewhere about where he was.

Q. What would you do in finding out where he was—what would you do?

A. If I couldn't see him—I didn't necessarily

(Testimony of H. H. Chapman.)

have to know where the switchman was all the time. I don't get what you are driving at.

Q. I want to know—I don't know how I can make it any plainer. [91]

Mr. Hamblen: He has answered it, it seems to me.

Mr. Hanley: Please now, let me finish the question.

Q. I will ask you again, Mr. Chapman, what was the usual custom and practice with reference to looking out for each other of the members of the switching crews, if you had any custom or practice with reference to it.

A. Well, now, I don't exactly get you there. What do you really mean now?

Q. You are switching cars—— A. Yes.

Q. And there are three men usually on your switching crew, the foreman and two switchmen, is that correct? A. Yes.

Q. Do you at any time during your switching operations want to know where the other members of the crew are?

A. Oh, yes, I like to know where they are, if they are around where the cars are rolling by.

Q. Do you look out for them?

A. Certainly, as much as we can.

Q. Assuming, Mr. Chapman, that an engine was about to make a switch of some cars and its located from seven to twenty or twenty five feet from that lead track switch, which evidently leads to track

(Testimony of H. H. Chapman.)

13; two cars attached to the engine; those two cars break the view of the engineer and fireman of the switch; assume that a member of the crew crosses the track in front of those cars, to throw this switch, the other helper is on the north side of the cars; his view is also obstructed from the switch and from the individual or member of the crew that goes to throw [92] the switch. Before starting those cars what would be the proper practice, not the proper practice, but what is the usual and customary practice in the yards of the Union Pacific Railroad with reference to obtaining signals relative to the starting of those cars?

A. Well, if that man was over on the other side and would throw the switch why I would like to either see him or be able to see the switch that was thrown before I started kicking any cars down there.

Q. If you couldn't see him or the switch then is there any other custom or practice?

A. I would try to get where I could see whether the switch was thrown or not.

Q. Is there any custom or practice to look out for him under those circumstances?

A. Well, he is included with the rest of it. He naturally wouldn't get in front of the cars unless he had some business there.

Q. Is there any custom or practice to get the signals from him?

A. Yes—

(Testimony of H. H. Chapman.)

Mr. Hamblen: We object to that as leading, and move to strike the answer.

Judge Schwellenbach: Objection overruled.

Q. How long did that practice exist in the yard?

A. So far as I know as long as I have been in the yard service. So far as I know there has never been any change in the practices.

Q. That continued until you left the service, retired [93] from the service in 1937?

A. Yes.

Mr. Hanley: You may cross examine.

#### Cross Examination

By Mr. Hamblen:

Q. How long did you work in the switch yard there prior to the time you retired?

A. I worked there twenty seven years, practically all the time. Well, I was off sick for about a year practically.

Q. Were you off during 1937? Were you acting as switchman in the yard there during the year 1937?

A. Yes, until I retired.

Q. Your time off was prior to this time, was it?

A. Yes.

Q. Now, were you engine foreman during that time?

A. A good share of the time. Most of the time.

Q. You had a crew under you?

A. Yes.

Q. And that crew was an ordinary switching

(Testimony of H. H. Chapman.)

crew, consisting of two other members beside the engineer and fireman?      A. Yes.

Q. You were in charge of the crew?

A. Yes.

Q. Now, isn't it a fact in handling a crew of that kind you had a pretty close understanding between you and other members as to what would be done prior to the time the switch was being made, was to be made. [94]

A. Well, some times we did and sometimes we did not. There are different switches to make and you can't draw a map of all of them.—Word of mouth and hand signals—

Q. Its a pretty busy time working in a switch yard during switching hours?      A. Yes.

Q. And lots to do for everybody.

A. Yes sir.

Q. And you have to step pretty lively to do it and get it done within the required time. You have to step pretty lively, that is correct, isn't it?

A. Yes.

Q. Now, Mr. Chapman, coming down to this switch marked on this exhibit A with the red cross, which is the switch involved here: Suppose you as engine foreman had given the signal or stated to the other switchman who was working with you to cross over that switch and put the two cars that were attached to the engine, kick them back into 13, and you jumped off there and opened the switch, or threw the switch so they would go in on

(Testimony of H. H. Chapman.)

13, under those circumstances there would be no necessity for you to cross back over on the other side of the track, would there be?

A. Well, I think they should know whether—I would have to see the man or the switch.

Q. How about if you saw the switch points?

A. Not necessarily. You see the switch point when it comes up against the rail, there is liable to be a pebble or something get in there— [95]

Q. If the switchman could see that the handle was down in the groove, would it be necessary for him to cross over? A. No, I guess not.

Mr. Hamblen: That is all.

#### Redirect Examination

By Mr. Hanley:

Q. Under the circumstances detailed to you by Counsel if the engine foreman should have said "we will let these two go 13", and then he got off and went across to throw the switch, what would be the practice with reference to whether or not you get the signal from him before you started those cars— assuming they were stopped before the move was made?

A. Well, if I could see the switch and see it was all right, and everything.

Q. Assuming your view was blocked off?

A. If it was blocked off naturally I would go out where I could see how things were, if my view was blocked, to know how that switch was lined.

Witness excused



**J. W. McNUTLY,**

a witness called and sworn, testified as follows:

**Direct Examination**

By Mr. Hanley:

Q. Where do you live?

A. East 308 Baldwin, Spokane.

Q. What is your occupation? [96]

A. Switchman.

Q. How long have you been employed as switchman? A. Oh, about twenty-four years.

Q. For what railroad do you work?

A. For the Northern Pacific.

Q. What yards have you worked in, or did you work in?

A. Both the Spokane yard and Yardley, train yard.

Q. How long have you worked in those particular yards? A. Well, twenty-four years.

Q. Did you work under the standard book of rules? A. Yes sir.

Q. What is meant by the Standard book of rules?

A. The same rules apply to all roads in the Western District here.

Q. Have you ever been an engine foreman?

A. Yes sir.

Q. Are you that now? A. Yes sir.

Q. What is the custom and practice with reference to who is in charge of the switch crew?

A. Why, the engine foreman.

(Testimony of J. W. McNulty.)

Q. Briefly, can you state what his duties are?

A. He handles the switch list he receives from the yard master, train master, and performs the work given to him by the yard master.

Q. I will ask you, do you have any connections with the Union Pacific, or any transfers over to the Union Pacific?      A. Yes. [97]

Q. You run into their yard from time to time?

A. We have a transfer—exchange cars. That's mostly done with the down town crew.

Q. Let me ask you this, Mr. McNulty, assuming an engine with a switch crew, and engine crew, coupled onto two box cars to pull them down the old main line here about six to twenty-five feet beyond this cross here which indicates the switch—you have been listening to the testimony here?

A. Yes.

Q. And stopped, and before they stopped the foreman of the crew got off and crossed the track as quick as the cars referred to passed where this switch was—he crossed from the north to the south—he was out of view as a result of the box cars and engine and so forth—he was out of view of all members of the engine crew and the other switchman who was on the other side—his purpose, apparently, was for the purpose of throwing that switch when he went across the track. Now, what would the usual custom and practice be, if any existed, before those cars were moved with reference to the switch or the man at the switch—

(Testimony of J. W. McNulty.)

Mr. Hamblen: If your Honor please, we object to that. That doesn't show the custom in the switch yards of the Union Pacific Company.

Judge Schwellenbach: He said the rules were the same and he said he had worked some time in the past—he didn't say when—transferring cars to the Union Pacific—I think you should ask him about the similarity, if any, [98] between the customs.

Q. Do you know how the cars are switched in the O. W. R. & N. yard, or the Union Pacific yard?

A. I never worked down there. I should think it would be the same.

Q. Well, do you know?                      A. No.

Q. Do you have any personal knowledge whether they do the work under the standard rules—do you know whether they do, or not?

A. They are supposed to.

Q. Did you make an examination of this book of rules when making transfers over there?

A. No sir.

Q. You do know they work under the standard book of rules.                      A. Yes.

Mr. Hamblen: We object. He said he didn't know how they operate over there in the Union Pacific yard.

Judge Schwellenbach: Objection overruled. You may examine him further as to his qualifications.

Q. How recently have you transferred cars to the Union Pacific yards?

(Testimony of J. W. McNulty.)

A. I haven't been down there for eight or nine months, I would say.

Q. Have you within the past year?

A. Yes.

Q. Were you transferring cars in 1939 into the Union [99] Pacific yards?

A. I couldn't say the dates. I have an idea I did. I was down there quite often.

Q. Did you in this year? A. Yes.

Q. Did you prior to that time? A. Yes.

Q. Did you in January or February, 1939, have transfers going into the Union Pacific yards?

A. We had transfers, but I don't believe I was down there at all during those months.

Q. Were you there in 1939 subsequent to February?

A. Well, now, I couldn't tell you now whether I was down there during that time.

Q. But you did work there and transfer in 1939.

A. Yes, years before.

Q. You did in 1938? A. Yes.

Q. Did you see switchmen give signals to move cars there? A. Yes.

Q. Did you observe the crew operating?

A. Yes.

Q. Well, those signals and operation there and method of handling switching, how did it compare with your yard? A. Just the same.

Mr. Hamblen: I would like to ask a few questions on voir dire. [100]

(Testimony of J. W. McNulty.)

Question on Voir Dire.

By Mr. Hamblen:

Q. Mr. McNulty just what was that movement or transfer from the Northern Pacific over to the Union Pacific?

A. Well, we delivered stock for one thing, and probably perishable goods, apples and so on.

Q. Did you take them into the yard?

A. We take them to the transfer.

Q. Where is the transfer?

A. Just above the O. W. R. & N. crossing.

Q. From the east?      A. Yes.

Q. And it wasn't connected in any way with the switching yard?      A. No.

Q. Then those cars you took, they were not taken into the switching yard of the Union Pacific.

A. Oh, no, no.

Mr. Hamblen: Then we object.

Q. (By Mr. Hanley) Where you delivered a transfer to the Union Pacific did you transfer or deliver it to their switch employees?

A. Well, once in a while they would be there to receive the cars, and lots of times they would not be there and we would leave the cars in the yard there on the transfer.

Q. When they were there to receive the cars did they handle them, start them and stop them, and go away with them?      A. Yes sir.

Q. With the same kind of signals you use and in the [101] same manner that you use on the

(Testimony of J. W. McNulty.)

Northern Pacific?      A. Yes sir.

Q. And the picking up was yard work with the yard crew of the Union Pacific.      A. Yes sir.

Q. And there was never any road crews handled the transfers?      A. Not that I know of.

Q. How far would that transfer be from the Union Pacific yards?

A. Well, I couldn't tell you. I believe they have switching yards east of the city. I would say it would be three miles, probably more, maybe a little less.

Q. Did you ever watch any of the Union Pacific yard men do any switching in any of the yards at any time?

A. Just going by, is all. I never stood and watched them.

Q. When going by how much did you see of them?

A. Oh, just cutting off cars and so on.

Q. Did you see them give any signals?

A. Yes.

Q. Did you see them kick cars?      A. Yes.

Q. Did you see them move cars with engine attached?      A. Yes.

Q. Couple and uncouple the engine from them?

A. Not so much of that—they usually have a string of cars switching. [102]

Q. Uncoupling cars, did you see that happen?

A. Yes.

(Testimony of J. W. McNulty.)

Q. How did the signals compare with those used in the Northern Pacific yards?

A. Just the same so far as I could see.

Q. How did the cutting off of the cars compare with the custom in the Northern Pacific yards?

A. Just the same.

Q. Did you see them give any hand signals?

A. Yes.

Q. How did that compare?

A. Just the same.

Mr. Hanley: You may cross examine on that phase, if you like.

#### Cross Examination

By Mr. Hamblen:

Q. You say you have made those observations as you were passing along.

A. Just as I was walking down Division Street, or happened to cut thru the yard over there.

Q. Where did you say you live?

A. 308 East Baldwin.

Q. Now, going to town you wouldn't go thru the yard?

A. Lots of times walking down, there is a cut off that cuts off a little. Sometimes I cut across the yard by the freight house.

Q. You usually went by automobile, did you not?

A. Well, quite often.

Q. You use your automobile in going to work, don't you? [103]

A. Yes sir.

Q. About when is the last time you think you

(Testimony of J. W. McNulty.)

remember the switching crew of the Union Pacific going thru its switching operations over there in the switch yard?

A. I couldn't tell exactly. I don't suppose it's been very long.

Q. Your observation was just casual, was it not?

A. That's all.

Q. You wouldn't undertake to testify or swear as to just how the Union Pacific Switching crew operated?

A. Only what I could see. They worked the same as we do over there on the Northern Pacific.

Q. From your very casual observation you mentioned you wouldn't undertake to sit here as an expert to tell how the Union Pacific switching crew handled their cars in the yard of the Union Pacific.

Q. Nothing, outside their signals are the same.

Q. You never worked there, of course.

A. No.

Judge Schwellenbach: It's a question of custom and practice here. You have your proof divided into two parts—one, the rules. As I understand from what I heard those rules specify the method of signalling. You are going further than that and showing there was a custom and practice among the employees of the Union Pacific. It seems to me it takes more than the observation of an occasional by-stander, despite the fact the by-stander may have been an engineer and may have been expert



(Testimony of J. W. McNulty.)

in his own line of business. He testified he has watched and [104] has seen them give the signals and the signals were just the same. I don't think he is qualified to testify as to the usual custom and practice, and method of switching operations in the Union Pacific yard. I will sustain the objection.

Mr. Hanley: Nothing further with this witness.

Witness Excused

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E. B. HINKLE,

recalled, continued examination on

Direct Examination.

Q. (By Mr. Hanley) Are you still employed by the Union Pacific Railroad? A. Yes sir.

Q. Were you a member of the train crew of Mr. Owens' on February 16, 1939?

A. Yes, sir, I was.

Q. Do you recall the accident to Mr. Owens?

A. Yes sir.

Q. What time of day did it happen?

A. On the 16th day of February, around about 3 P.M.

Q. What part of the switching crew were you on? A. I was following the engine.

Q. What were your duties generally? Just briefly.

A. Well, working under instructions of the

(Testimony of E. B. Hinkle.)

Foreman, handling, cutting off cars or flagging crossings, whatever might be necessary for me to do.

Q. Do you remember picking up two cars on that day?      A. Yes sir.

Q. Go ahead and tell us what you did with reference to [105] getting the two cars.

A. We had picked those two cars off of what we call the main line and proceeded in an easterly direction toward Division Street up over the main line switch that leads into the lead toward No. 7 and 13—that particular switch that leads into 7 and 13—

Q. Will you just point that out on the map? You recognize it, don't you?

A. Yes sir. We had picked up these cars farther down by Washington Street and came up here to this switch. When we were down there to pick these cars up Foreman Owens and helper Koefod was standing at the two cars—we had switched the cars to another track—and Foreman Owens gave me the crossing sign by crossing the arms which meant for me to go to Division Street, that particular crossing has to be flagged each time you pass over it, or any part of it, so I heard the engine go by me and I got on the back foot board of the engine tank, the engine was headed in a westerly direction, I was on the east end, on the back end of the engine tank and he gave me the crossing sign, and I stayed on this back foot board until the

(Testimony of E. B. Hinkle.)

engine stopped up here, then I stepped off and walked on up to Division Street.

Q. How far was the back end of the engine, the east end from Division Street?

A. I would say approximately 160 feet from the back of the engine where I stepped off on up to Division Street.

Q. Did you walk then on up to Division Street?

A. I walked on up to Division Street and when the [106] engine had stopped and they made the move, cut those cars off into what we call 13 lead I knew by the sign I got we were going to use Division Street, which I had not been instructed verbally, only by sign, to go to the crossing. I proceeded in that direction and I was possibly within twenty or thirty feet of the crossing when, after they made the move, the engine bell started ringing and they backed up toward Division Street, and then stopped all at once. By that time I had heard some one holler—where it come from I don't know—I couldn't say as to that—then I turned around and see the engineer Richards jump off the engine and run toward the scene of the accident.

Q. What did you do then?

A. I ran in that direction as quick as I could to give them all the aid I could.

Q. Did you get to Mr. Owens? A. Yes.

Q. Did you stay with him there?

A. I stayed until the yard master Pidcock came.

(Testimony of E. B. Hinkle.)

then I went to Division Street to direct the Ambulance in.

Q. Did you see Mr. Koefod—he was your other helper? A. Yes, he was.

Q. Did you see where he was standing at the time the move was made?

A. I seen Mr. Koefod running toward the yard office.

Q. You didn't see him before they made the switch?

A. Before they made the switch Mr. Koefod and Owens was hanging on the side of the two cars, each end of the [107] cars by the grab irons.

Q. What side was that?

A. On what we call the north side.

Q. Then when the train stopped did you see where either one went to?

A. No, I did not. I stepped right off the back of the engine tank and proceeded on up to Division Street with my back to them, and I didn't see any move they made.

Q. Now, what was your practice, Mr. Hinkle, with reference to looking out for each other in the crew?

A. Well, we always look for each other, that is, if any one disappears something out of the ordinary.

Q. Was that the usual and customary practice?

A. If a person gets out of sight where he can't be seen, or disappears too long, we always look out

(Testimony of E. B. Hinkle.)

for them, to stop and see where they're at. On this particular move I couldn't say—I wasn't instructed——

Q. You didn't see the move at all, did you?

A. I didn't see the move at all.

Q. Now, Mr. Hinkle, have you ever been an engine foreman?      A. Yes sir.

Q. How long did you serve as an engine foreman?

A. Well, I couldn't say exactly the time. At different times. Three or four months at a time or a year.

Q. Then you had twenty-two years as switchman?

A. Twenty years experience in this yard.

Q. Now, you are familiar with where those cars pulled up and stopped? [108]      A. Yes sir.

Q. We will assume the west end of the two cars were anywhere from—well, I think six to twenty-five feet from this switch here—track—I think you call that No. 7 switch?

A. Yes, that's what's called main line No. 7.

Q. As they were pulling by Mr. Owens dropped off at the switch on the north side of the track and went across to the south side. The view here was obstructed from the engineer and fireman and Mr. Koeiod of the switch and of Mr. Owens before the kick was made of the cars, you heard that?

A. Yes.

(Testimony of E. B. Hinkle.)

Q. Before making that switch what is the custom and practice with reference to getting a signal from either Mr. Owens or seeing the switch before the kick was made?

A. Well, if the instruction was given what to do they always proceed as soon as——

Q. I haven't detailed any instruction to you. I want to know what the custom is.

A. Well, if there had been no instruction when they stopped there I would wait to see where we were going until I got the signal.

Q. It was the custom and practice to get the signal from Mr. Owens?

A. If there hadn't been no instructions it would have been—as to what he was going to do.

Q. He was the foreman in charge of the crew.

A. Yes sir.

Q. He gives the signals for the movement of the crew, [109] and the instructions.

A. Yes sir.

Q. You have no signals, that is there are no signals you go by, hand or lamp signals, except those detailed in your book of rules?

A. Yes, we have signals we use in yard work—it doesn't show in the book of rules. For instance, track signs—there's no track signs given in the book of rules I ever noticed. That's a made up rule that has been followed from one generation to the other.

Q. That's like the sign you got to flag the crossing?

A. Yes.

(Testimony of E. B. Hinkle.)

Q. But for stopping and starting the cars you go by the signals detailed in the book of rules, is that right?      A. Yes sir.

Q. How far away did you get from the back of the engine, tender of the engine, toward Division Street before you knew the switching move had been made?

A. Well, I couldn't say positively, fifty or seventy-five feet.

Q. Was there any whistle sounded before you heard the kicking movement of the cars?

A. I heard the movement of the kicking of the cars, yes.

Q. Was there any whistle sounded?

A. Not that I heard. I heard the bell before I got to Division.

Q. Did the bell ring before they made the kick?

A. Not that I heard of. [110]

Q. Was there anything to interfere with your hearing?      A. No.

Q. You were only seventy-five feet from the engine. How far could you hear the bell on the engine?

A. You could hear it quite a ways. The atmosphere has something to do with it, of course.

Q. Did you hear the cars after they were cut off, moving down?      A. Yes sir.

Q. Were you in a position where you could estimate the speed of them?

A. Oh, I would say anywhere from six to eight

(Testimony of E. B. Hinkle.)

miles an hour, I would judge, from the way they were rolling.

Q. Where was Mr. Owens lying when you first saw him?

A. When I first saw him he was lying just south of the south rail, approximately fifteen feet east of the switch stand.

Q. Did you see him right after the cars had gone over him?

A. Yes sir, I was looking in that direction and the cars run over him. That was after they had gone over him I saw him lying there.

Q. Did you stay with him any definite length of time?

A. Well, I suppose I was there, possibly, two or three minutes until the yardmaster Pidcock came and said they had called for the ambulance and for me to go to Division Street and direct the ambulance in there [111]

Q. Was he conscious during that period of time?

A. He seemed to be conscious.

Mr. Hanley: You may cross examine.

#### Cross Examination

By Mr. Hamblen:

Q. I want to get it straight. Where did you find Mr. Owens lying when you came back with reference to the switch stand, was it east or west of the switch stand?

A. Well, it would be west and south of the



(Testimony of E. B. Hinkle.)

switch stand about fifteen feet from the switch stand, that this, particularly the head.

Q. I think you said east before—I just wanted to correct that.

A. That's my mistake. I got the directions twisted.

Q. Now, Mr. Hinkle, you conducted many switching operations in this yard here this day, had you?      A. Yes sir.

Q. On this particular day in any of the switching operations within that yard was the bell rung prior to the making of the switching movement?

A. You are speaking just of the movement within the yard itself without crossing the street?

Q. That's right. I am just speaking of the movement in the yard without crossing any street.

A. The bell is very seldom rung.

Mr. Hanley: I object to that—

Judge Schwellenbach: The answer is not responsive. The question is whether or not it was rung. [112]

Q. Can you recall whether the bell was rung on any switching movement within this yard that day—I am speaking just of the movement confined to the yard limits without crossing any street.

A. I couldn't recall—when he pushed the cars over the main line across Washington street. The bell is never rung as a rule unless some one crosses the track or some stranger happens to come thru the yard, or some one passing—then the bell is

(Testimony of E. B. Hinkle.)

rung, but not continuously while working, unless crossing a crossing.

Mr. Hanley: I move to strike the answer——

Judge Schwellenbach: The motion is granted and the jury instructed to disregard the entire answer.

Q. Mr. Hinkle, you testified with reference to the provision of looking out for each other during switching operations, and I believe you stated so far as possible it was usual to keep track of the other members of the crew, is that correct?

A. Yes sir.

Q. For example, in this particular movement you were walking up to flag the crossing.

A. Yes sir.

Q. Under those circumstances there could be no duty devolving on you to keep track of Mr. Owens, could there?

A. In this particular it was particular for me to walk on back to the crossing because I knew not what movement was next, whether they were going to use that crossing in their next move, or whether they were going on down into the yard to get hold of another string of cars to [113] use that crossing.

Q. In other words, you had received crossing instructions from Foreman Owens.

A. Yes sir.

Q. And you were carrying out those instructions.

A. Yes sir.

Mr. Hamblen: That is all.

Witness Excused

Mr. Hanley I would like to ask Mr. Koefod one question I forgot to ask him on direct examination.

Whereupon

O. S. KOEFOD,

recalled, testified as follows

Direct Examination

By Mr. Hanley:

Q. Was there anything where you were standing, or where you originally got off the cars, before you gave the kick signal, was there anything at all that obstructed your view, or any reason at all you couldn't have walked down to the end of the cars rather than walk out away from them and saw where Mr. Owens was?

A. Well, when I made the move and stepped out there I didn't pay any attention to Mr. Owens or the switch stand. It was just the rail, and I tried to put myself in the same position, and I believe the corner of the car obstructed the view of Owens and the switch stand.

Q. There was nothing to prevent you from going down to the corner of the car, was there?

A. No. [114]

Q. If you had gone down there and saw Mr. Owens, or got a signal from Mr. Owens you could at that point have given the signal to the engineer, couldn't you?

A. Yes, I could have. We pulled up there pretty short. We stopped pretty short over that switch and ordinarily we will pull up here probably twenty or

(Testimony of O. S. Koefod.)

twenty-five feet over the switch. Well, then if you are twenty feet over the switch point invariably a man will step out. I know I always did and I believe most of the men that are switching will step out to get a view of the switch point, but this particular move was stopped short so naturally it was natural for me to step out there and I stepped out.

Q. There was nothing to prevent you from stepping out.           A. No.

Mr. Hanley: You may cross examine.

**Cross Examination**

By Mr. Hamblen:

Q. You knew when the train stopped you were to cut off those two cars and kick them down.

A. Yes sir.

Q. What was the natural movement for you to make with reference to putting yourself in a position to pull the draw bar? Would you go back toward the switch or go toward the engine?

A. It's natural to be up toward the engine, providing the cars are over where you can see the switch points.

Q. You saw the switch points and saw they were turned?           A. Yes. [115]

Q. And then you started toward the engine?

A. Yes.

Q. So when the engine kicked the cars down you could pull the draw?           A. Yes.

Q. And that's what you did.           A. Yes.

(Testimony of O. S. Koefod.)

Q. And that's the opposite direction from the switch..      A. Yes sir.

### Redirect Examination

By Mr. Hanley:

Q. You were closer to the switch and the cars than the engineer?

A. No. I was possibly about thirty, I imagine, probably 32 feet from the end of the car from where I was standing, and I just stepped out possibly twenty feet more.

Q. Have you examined those switch points down there lately?      A. No, I have not.

Q. Did you examine them at the time?

A. No, sir. I did not.

Q. Then could you say—you did see them—you stated you did see them.

A. I see the switch points, yes, but not the switch stand.

Q. Were the points of the switch up even with the top of the rail of the lead track?

A. Yes sir, it was lined—the point was against the rail. [116]

Q. Did the point itself come up even with the top of the rail of the lead track?

A. Those points don't come entirely to the top. They are just a little below.

Q. About one inch below the top?

A. Well, no, I don't believe one inch. I couldn't say exactly because I haven't measured it. They should be level.

(Testimony of O. S. Koefod.)

**Recross Examination**

By Mr. Hamblen:

Q. Is that due to the wear on the switch point by use of the engine and cars going back and forth over it?      A. I believe it is.

Q. It was perfectly plain from where you stood—you could see the switch points and see their position, could you?      A. Yes sir.

Witness Excused.

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**ELMER SHORT,**

a witness called and sworn, testified as follows:

**Direct Examination**

By Mr. Hanley:

Q. Where do you live?

A. North 3316 Lincoln, Spokane.

Q. What is your occupation?

A. I work for the Washington Machinery Company.

Q. How long have you been employed there?

A. Five years.

Q. What do you do in that machine shop?

A. Well, I have had different jobs. Now I am running [117] a radio drill press.

Q. Were you working there on February 16, 1939?      A. Yes sir.

Q. Did you know Mr. Owens during his life time?

(Testimony of Elmer Short.)

A. Well, no, I didn't know him personally.

Q. Did you know him when you see him?

A. Just know him when I see him.

Q. Do you recall an accident happening to him on February 16, 1939?

A. Yes sir.

Q. Where were you at the time?

A. At that time I was getting some wood. The Washington Machinery Company had some cord wood loaded off from cars along there.

Q. How close was that to the tracks?

A. I imagine probably eighty feet.

Q. Do you recognize these tracks here (calling witness' attention to Plaintiff's Exhibit A). Do you recognize this as being a drawing of the tracks down west of Division Street?

A. Yes sir.

Q. Where is your machinery company located with reference to these tracks here—the whole main track?

A. I imagine it would be right along in here.

Q. Does it run out to the street?

A. Well, it goes pretty close to Division Street.

Q. Can you make a mark about where you were Here is the switch that has been described in the testimony—did you ever see this switch? [118]

A. Yes.

Q. How often have you seen it?

A. I could see it most any time I looked over there.

Q. Is it in the same place now as it was in February, 1939?

A. I guess it is.

(Testimony of Elmer Short.)

Q. Could you make a mark with this blue pencil—you say you were about eighty feet from there. Just indicate about where you were standing.

A. This about where we unload our cord wood and I was working on the cord wood I believe about in there, as near as I can figure.

Q. When you say you were about eighty feet you mean eighty feet from where?

Mr. Hamblen: Can you put a mark there so the record will show?

Judge Schwelienbach: Put your initials there—"E. S.".

Q. Where were you standing when the accident happened? Was it up on a bank?

A. Just a little up on the bank by the cord wood pile.

Q. What did you see?

A. Well, I seen Mr. Owens, I guess it was, I didn't know the man—or the switchman get off the cars over there and go across the track——

Q. Which way did he go across?

A. Crossed toward the switch.

Q. That would be from——

A. The north side going south. [119]

Q. You saw him go across the track, you say?

A. Yes sir.

Q. How many cars were there, did you observe?

A. Two.

Q. Was the engine attached to them?



(Testimony of Elmer Short.)

A. Yes, it was before they kicked them loose.

Q. Where were they standing? Were they standing still or did you see them move up there?

A. Well, now, I wasn't paying much attention to the train—I was supposed to be working on this cord wood.

Q. Did you see them stop there?

A. I seen the switch engine and the two cars stop over there.

Q. How far would you say, if you can say, was the west end of the west car from this switch here?

A. Well, that would be pretty hard for me to say.

Q. Could you approximate it?

A. By guessing at it. As near as I could remember it would be about twenty feet or thirty feet, something like that, from the switch.

Q. Between twenty and thirty feet would that catch it? A. As near as I can remember.

Q. What did you see after you saw Mr. Owens go from the north to the south side across the track, what did you see?

A. I wasn't paying any attention to the switching in particular, but I heard somebody holler and I noticed the cars as they went over him—I could see right under the cars. [120]

Q. Did you see him under the cars?

A. I could see him laying across the rail and the cars went over him.

(Testimony of Elmer Short.)

Q. Could you see the switch stand from where you were located?

A. I couldn't at that time, the cars were in the way. They were going by.

Q. Where did you see him in reference to the position of the switch stand?

A. Well, after I heard him holler I run up on the bank there and hollered in the shop to the boys that a man had got run over down there, and we went down there and I imagine he was ten or fifteen feet below the switch, as near as I can remember.

Q. You mean west of the switch?

A. Yes, that would be west down the track.

Q. Before this move was made did you hear the bell rung?

A. No.

Q. Did you hear any whistle blown?

A. No.

Q. Did you see any switchman along on the north side of those cars, on the side you were?

A. I don't believe I did at that time, only just when they pulled up there and stopped, I noticed them then.

Q. How many did you see at that time?

A. After the cars passed over I seen the engine sitting up there and a brakie by the engine.

Q. Did you see anybody alongside of the cars during switching operations there, when they were being kicked? [121]

A. Yes, there was a switchman there.

(Testimony of Elmer Short.)

Q. Could you see about where he was?

A. No, I couldn't tell.

Q. Did you see him cut off the cars?

A. No, I didn't. I was busy on the wood.

Q. Could you say how fast the cars were moving?

Q. It would be pretty hard to estimate the speed of them, too.

Q. Well, were they going slow or fast?

A. Well, they were going, I imagine, five or six miles an hour. I wouldn't know just what the speed would be.

Q. If you observed, about how far would you say the back of the engine, the east end of the engine was from the intersection of Division Street, the west line of Division Street?

A. Oh, I imagine a couple of car lengths, something like that, as near as I could remember.

Q. Eighty or ninety feet?

A. Something like that.

Q. Did you go over to where Mr. Owens was at the time?

A. Yes sir.

Q. Did you help render first aid to him?

A. Yes sir.

Q. How long was he there?

A. Oh, I imagine—it seemed like an awful long time before this ambulance got there. Of course it wasn't very long. Probably seven or eight minutes, might have been longer than that.

Q. Was Mr. Owens conscious during that time?

(Testimony of Elmer Short.)

A. Well, he seemed to know—we held him up there. We wrapped some old overalls around him.

Q. What were his injuries?

A. It run over his legs, as near as I could tell, about this way (indicating in a slanting manner from below one hip to below the knee on other leg).

Q. One leg was cut off below the hip and one just below the knee, is that a proper description?

A. Yes sir.

Mr. Hanley: You may examine:

Cross Examination

By Mr. Hamblen:

Q. In unloading the wood there were you unloading that from a flat car?

A. No, I wasn't unloading.

Q. What were you doing?

A. I had some chains down there and was putting those chains on this wood so it could be picked up with a crane and taken up to the building.

Q. You weren't paying any particular attention to the switching operations?

A. No, I wasn't.

Q. And the first thing that called your attention to the situation was you heard some one yelling.

A. Yes sir.

Q. And you looked over there and saw Mr. Owens under the car?

(Testimony of Elmer Short.)

A. Yes sir, I could see him there as the cars passed over him. [123]

Q. And the cars kept on moving and went on down in the switch yard. A. Yes sir.

Q. And the engine on the east end of the yard stopped near the switch.

A. Well, the engine seemed to be about two car lengths, or a little better, standing still when I noticed it.

Q. Did you see the engineer run down to Mr. Owens?

A. I didn't pay much attention who all was running down there. We were busy getting down there ourselves.

Q. Who went with you?

A. I guess there was half a dozen of us, or more, than run down from the shop practically all at the same time. The boss was down there, too.

Mr. Hamblen: I think that's all.

Witness Excused

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BETTY McQUEEN,

a witness called and sworn testified as follows:

Direct Examination

By Mr. Hanley:

Q. (By the Court) What is your name?

A. Betty McQueen.

(Testimony of Betty McQueen.)

Q. Where do you live?

A. Pacific Hotel, Spokane.

Q. (By Mr. Hanley) What is your profession?

A. I am a nurse.

Q. A graduate nurse? A. Yes. [124]

Q. What hospital were you working in in February, 1939? A. Sacred Heart Hospital.

Q. Spokane? A. Yes.

Q. How long ago did you graduate as a nurse?

A. Two years ago.

Q. Where at? A. Sacred Heart.

Q. Were you there when they brought Mr. Owens in? A. Yes.

Q. Did you attend him? A. Yes.

Q. Will you state whether or not he was conscious? A. Yes, he was conscious.

Q. What time did they bring him to the hospital?

A. I don't remember the exact time—it was—in the late afternoon, I imagine before 4.

Q. Before four o'clock? A. Yes.

Q. How long did he live?

A. About two hours, I think.

Q. After he got into the hospital, and during that period of two hours was he conscious most of the time, or all of the time or a part of the time?

A. He was conscious all the time I was in there.

Q. How often did you go in there?

(Testimony of Betty McQueen.)

A. I was there most of the time.

Q. Did they take him into the surgery?

A. Yes.

Q. Were you in there at that time? [125]

A. Yes.

Q. Was he under an anaesthetic in there?

A. No.

Q. What was the expression on his face?

A. Pain.

Q. Was it drawn? A. Yes.

Q. Did he complain of pain?

A. He would moan.

Q. Did he ask for any assistance, or anything like that?

A. I can't remember the things he said now.

Q. Did he say anything?

A. He called for his son and he was telling one of the nurses where to get his car keys out of his pocket.

Q. Was his face drawn all the time from the time——

Mr. Hamblen: I think he ought to ask what she observed with reference to his expression, and so forth.

Judge Schwellenbach: Yes, I think so.

Q. All right. What did you observe with reference to his expression during the time he was in the hospital?

A. He would bite his lip and moan like you would if in a lot of pain.

(Testimony of Betty McQueen.)

Q. How long did that continue?

A. All the time he was conscious.

Q. Were you there when he died?

A. Yes, I was.

Q. Was he conscious up to the time of his death, or almost? [126]

A. Weil, almost. Just before he died he lapsed into unconsciousness.

Q. Who else was there in the room with him, if you remember?

A. Dr. O'Shea was.

Q. Mrs. Owens there?

A. She was not. She was just outside the door.

Mr. Hanley: You may cross examine.

Cross Examination

By Mr. Hamblen:

Q. You say Dr. O'Shea was present?

A. Yes.

Q. Was he there during most of the time?

A. I don't remember just how long he was there.

Q. Do you recall whether he administered anything to Mr. Owens to relieve the pain?

A. I don't remember.

Q. Was there any other doctor there besides Dr. O'Shea?

A. There might have been an interne.

Q. You don't remember?

A. No, I don't remember.

Q. That statement about his keys he made, was



(Testimony of Betty McQueen.)

that just before he died, some time after he was in the hospital?

A. Well, no, it wasn't long after he came in. He did talk to us, I can't remember now what he said.

Mr. Hamblen: I think thats all.

Redirect Examination

By Mr. Hanley:

Q. Who is Dr. O'Shea? [127]

A. He is doctor for the Union Pacific.

Mr. Hanley: I see. Thats all.

Witness Excused

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C. N. RICHARDS,

a witness called and sworn, testified as follows:

Direct Examination

By Mr. Hanley:

Q. (By the Court) State your name.

A. C. N. Richards.

Q. Where do you live?

A. 2207 West Jackson in Spokane.

Q. (By Mr. Hanley) What is your occupation?

A. Engineer.

Q. How long have you been an engineer?

A. Since 1916.

Q. You are employed by the Union Pacific?

A. Yes.

(Testimony of C. N. Richards.)

Q. Where do you work?

A. In the Union Pacific yards.

Q. Spokane? A. Spokane.

Q. You have been in the yard how long?

A. Since 1912, lacking about one year.

Q. Were you engineer there on February 16, 1939, when Mr. Owens met with an accident?

A. Yes sir.

Q. Did you have hold of any cars just prior to the time of the accident?

A. We had been switching prior to the accident. [128]

Q. Did you have two cars?

A. We came down there with two cars.

Q. Where did you come from?

A. From the vicinity of Washington street.

Q. Were they box cars? A. Yes sir.

Q. What track did you come down on?

A. What they call the main line track, the old main line track.

Q. You call it the lead some times?

A. Call it lead, yes.

Q. Did you see Mr. Owens before you left Washington, or close to Washington Street?

A. I see him just before they left. He was on the ground before I started.

Q. He gave you the signal to start?

A. Yes sir.

Q. Was Mr. Koefod there at the time?

A. Yes.

(Testimony of C. N. Richards.)

Q. You responded to the signal? A. Yes.

Q. What did you do then?

A. He gave me the back up sign and I started in reverse motion to back up, and both of them got on the cars.

Q. What side? A. The north side.

Q. Then how far down the old main line or lead track did you go? Do you recognize this map?

A. Yes. [129]

Q. This is supposed to represent the switch there, track No. 7, is that right? A. Yes.

Q. Now, how far did you go by this switch?

A. Well, just eight or ten feet over the switch.

Q. You are talking about the two cars now?

A. The two cars was over the switch probably eight or ten feet.

Q. The west end of the west car was about that distance from the switch? A. Yes.

Q. Before you stopped did you get a signal from any one?

A. Yes sir, I got a stop sign from Mr. Owens.

Q. Where was he at the time he gave you the signal?

A. He just got off the car on the ground.

Q. Where did he get off at?

A. Opposite the switch stand.

Q. You could see him get off the car?

A. Yes sir.

Q. Could you see the switch stand when you stopped? A. No sir, not when I stopped.

(Testimony of C. N. Richards.)

Q. What prevented it?

A. The two cars ahead of the engine obstructed the view.

Q. How about the fireman?

A. He couldn't see the switch stand on account of the two cars and the curve.

Q. You were stopped there how long?

A. I couldn't say just how long. Long enough for a [130] man to walk across and throw the switch.

Q. Then did you start the cars?

A. Yes, after I got the signal.

Q. Who from? A. Mr. Koefod.

Q. Where was he standing at that time?

A. He was in the neighborhood of about sixty feet from the engine.

Q. How close to the cars?

A. About twenty feet north.

Q. What kind of a signal did he give?

A. He gave me the kick sign, proceed kick sign, go ahead kick sign.

Q. What did you do when you got the kick sign? A. I responded to his signal.

Q. Where was he when he gave you this?

A. He was in the neighborhood of—after he gave me the signal he walked toward the cars.

Q. Was he all of twenty feet out?

A. No. He wasn't all of twenty feet out. He walked in after he looked at the switch points. He

(Testimony of C. N. Richards.)

walked toward the track then he gave me the kick sign.

Q. You don't know whether he looked at the switch points or not, do you?

A. I couldn't see what he was looking at, but he was looking.

Q. You, yourself, couldn't see the switch points.

A. No.

Q. About how fast did the cars move away from your [131] engine?

A. I kicked them about six miles an hour, I should judge.

Q. Where did the engine cut off. Where did you get the stop sign?

A. I was about forty feet from the switch when I stopped.

Q. Who did you get the signal from?

A. Mr. Koefod.

Q. Then what did you do?

A. I got the back up sign from him and the Pendleton and I reversed my engine and started back.

Q. You operated the engine solely by signals?

A. Yes sir.

Q. Hand signals in the day time?

A. Yes sir.

Q. And lamp signals by night.

A. Yes.

Q. You don't take verbal signals.

A. No, not verbal signals, no.

(Testimony of C. N. Richards.)

Q. What did you do then when the engine was cut off?

A. I got the back up sign and started back—when I got the engine about fifty feet from the crossing and looked ahead—

Q. What did you see?

A. I saw Mr. Owens lying on the ground about fifteen feet from the switch stand.

Q. Then what did you do?

A. I said to the fireman 'My God Leyle! is on the ground, and I reversed the engine immediately and went down [132] there within thirty or forty feet of him, and jumped off to go to his aid, and he was kind of leaning back on his elbows, and I reached down and got my arm around him and helped him up the best I could. Both legs were injured and I didn't know if his right leg was off, but I could see his left leg was gone.

Q. Was he conscious at that time?

A. Perfectly conscious.

Q. You helped get him in the ambulance?

A. Well, I was there to help, yes.

Q. How long was it from the time the accident occurred until the ambulance came?

A. I couldn't say definitely. It seemed a long time before the ambulance got there but it was only a few minutes. I understood it was only fifteen minutes from the time he was hurt until he was in the hospital.

(Testimony of C. N. Richards.)

Q. Did you ring any bell before starting movement of that engine?

A. Engine movement?

Q. On kicking the cars, yes. A. No sir.

Q. You did ring the bell when you started back? A. I did.

Q. Did you blow the whistle?

A. It wasn't necessary.

Q. Did you see Mr. Owens start across in front of the cars? A. I see him start across.

Q. And the next time you saw him he was on the ground. [133] A. On the ground.

Q. Mr. Richards, do you recognize this as the book of rules—I guess it has been identified—that was in effect at that time? A. Yes sir.

Mr. Hanley: If your Honor please, I want to offer this book of rules in evidence at this time, first, for the purpose of showing general rule No. 12, 'Hand Signals', and, second, for the purpose of showing rule No. 30. And then there is another rule, rule No. 7, under Signals, and in addition to that for the purpose of showing there are no other rules in the book of rules that deal with the ringing of the bell, or the blowing of the whistle. There is another rule that follows that rule 30 about the unnecessary use of it, and so forth.

Mr. Hamblen: I object to the introduction of the book of rules. I am not objecting to the introduction of any specific rule that Counsel thinks has any bearing on this case, and with reference to

(Testimony of C. N. Richards.)

the absence of other rules we are willing to admit there is no other rule in the book affecting the ringing of the bell or blowing of the whistle, with the understanding if there be we would have the opportunity of offering that specific rule. If your Honor will look at the book you will see there are many things in it that have absolutely no bearing on this case.

Judge Schwellenbach: Will you be able by morning to stipulate definitely whether or not there are other rules involving the question in the book?

[134]

Mr Hamblen: Yes, your Honor.

Judge Schwellenbach: I will deny your request to introduce the entire book, but will permit you to introduce copies of rules 12, 30 and 7, typewritten copies which the jury will take to the juryroom with them the same as if the book itself were put in evidence. Then tomorrow morning you can decide as to the other rules, if any, pertaining to blowing of whistles and ringing of bells.

Whereupon

Court adjourned to convene at 10 o'clock A.M., April 22, at which time, all parties present, the trial proceeded.

April 22;

10 A.M.

Mr. Hanley: I have these copies here of rules 7, 12 and 30.



(Testimony of C. N. Richards.)

Mr. Hamblen: I have no objection to them.

Judge Schwellenbach: They may be admitted as Plaintiff's Exhibit B. Now, as to the stipulation with reference to whether or not there was anything else in the rule book with reference to ringing the bell——

Mr. Hamblen: I think there is nothing in the remotest way could be considered applicable.

Judge Schwellenbach: The record may show it is stipulated there is no other rule in the book involving the ringing of the bell that could in any way be applicable to this case.

## PLAINTIFF'S EXHIBIT NO. "B"

### UNION PACIFIC SYSTEM RULES AND INSTRUCTIONS

§173

#### "12. Hand, Flag and Lamp Signals.

##### Manner of Using

##### Indication

- (c) Raised and lowered (Proceed vertically. (
- (h) Signals must be given from a point where they can be plainly seen, and in such a way that they cannot be misunderstood."

(Testimony of C. N. Richards.)

"30. The engine bell must be rung when an engine <sup>is</sup> about to move and while approaching and passing public crossings at grade, stations, tunnels and snowsheds."

7-(a) When practicable all signals by hand must be given on the *engine-men's* side; flag & lamp signal (when not by hand), fusees and torpedoes must also be placed on that side; but they must be respected when received from or found on either side. (See Rule 888) [221]

Q. (By Mr. Hanley) Mr. Richards, when you pulled up with the two cars and made the stop preparatory to the [135] subsequent movement of kicking the cars into the track that eventually lead into track 13 what operation with your engine did you have to make?

A. Reverse the engine--release the brakes.

Q. What do you reverse the engine with?

A. The reverse lever.

Q. Where is that located?

A. In the cab to my left hand along side of me.

Q. You do that by hand?

A. By hand, yes sir.

Q. You say you released the brakes, what brakes?

A. The air brakes.

(Testimony of C. N. Richards.)

Q. Would that mean the air brakes on the engine only? A. The engine and tank.

Q. You had no air on the cars you were switching? A. No sir.

Q. So when you pulled up and stopped your first move was to set the air brake. A. Yes sir.

Q. And then your next move reverses your lever.

A. I reversed the lever after I got the signal.

Q. You didn't reverse the lever until afterwards.

A. Until after I got the signal.

Q. And you stopped how long?

A. Just a momentary stop, I couldn't say how long.

Q. How long until you got the signal?

A. I couldn't say—just a momentary stop.

Q. Then you reversed the lever.

A. And released the brake and acted on the signal. [136]

Q. How close to the switch did the engine go when you made the stop after the cars were cut off?

A. I would say approximately about forty feet from the switch.

Q. About a car length?

A. About a car length.

Mr. Hanley: You may cross examine.

#### Cross Examination

By Mr. Hamblen:

Q. How long did you say you had worked in the Spokane switching yards? A. Since 1912.

(Testimony of C. N. Richards.)

Q. Had you been operating an engine all that time?

A. Been firing and running an engine since that time.

Q. How long had you worked with Foreman Leyle F. Owens?

A. Ever since he had been here—

Q. How many years?

A. I think he came here in 1916. I am not sure which date it was—along about 1916.

Q. Since that time you have been in constant operation with him?

A. Yes sir, on different jobs.

Q. And mostly in the switching yard?

A. Always in the switching yard.

Q. Now what kind of an engine were you operating as engineer on the day of the accident?

A. A small consolidated engine.

Q. The 700 type? [137]

A. 715 is the engine number.

Q. Showing you defendant's identification No. 1, what is that picture, if you can say?

A. That is the engine I was running on that day.

Q. The day of the accident?      A. Yes sir.

Q. That picture shows it to be approximately the same condition as it was on the day of the accident, does it?      A. The same.

Q. This is the front view of the engine, is it?

A. Yes sir.

(Testimony of C. N. Richards.)

Q. Do you see a man in the picture?

A. Yes sir.

Q. What does he have his hand on?

A. The pin puller—the cut lever.

Q. The man has his hand on the pin lever that pulls the pin which would release the cars the engine is attached to.

A. Yes sir.

Mr. Hamblen: I offer defendant's Exhibit 1 for identification in evidence.

Mr. Hanley: What is the purpose of it, just to show us his engine?

Mr. Hamblen: To show the engine and show the arrangement on the front with reference to the pin lever.

Mr. Hanley: No significance attached to the man there?

Mr. Hamblen: No.

Mr. Hanley: No objection.

Judge Schwellenbach: It may be admitted. [138]

Q. Now, Mr. Richards, this engine you have just referred to was headed in at the time of the accident against two box cars, was it?

A. Yes sir.

Q. In other words, the engine was headed west.

A. Yes sir.

Q. Now, as I understand it, you had backed up along the main line over this lead switch, is that correct?

A. Yes sir.

Q. And Mr. Owens and Mr. Koefod as you backed up were, both, on different cars, but hanging onto the cars on the north side of the track.

(Testimony of C. N. Richards.)

A. That's right.

Q. And Mr. Owens dropped off at the switch.

A. Yes.

Q. As you crossed over the switch he gave you the stop signal?

A. Yes sir.

Q. And you stopped.

A. Yes sir.

Q. Now, in connection with your receiving the signal, who did you receive the signals from?

A. From the man closest to the engine.

Q. Is it necessary for you to receive signals from both the engine foreman and the engine helper?

A. Not necessarily.

Q. In other words, you can receive the signal from either one.

A. Yes sir. [139]

Q. And you did receive the signal from the man closest to the engine, is that correct?

A. Yes sir.

Q. After you stopped you say Mr. Owens passed out of view behind the cars.

A. Yes sir.

Q. Then you saw Mr. Koefod, I believe you testified.

A. Yes sir.

Q. Who would be the man in that situation for you to receive the signal from?

A. The man closest to the engine.

Q. Who was that?

A. That was Mr. Koefod.

Q. Did you receive a signal from Mr. Koefod?

A. Yes sir.

Q. What was that signal?

A. That was the kick signal.

(Testimony of C. N. Richards.)

Q. Will you show the jury again what kind of a signal that is?

(Witness demonstrates)

Q. Does that signal imply an abrupt push and more so than a shove? A. It's a kick.

Q. How would you describe it?

A. It's heavier than a shove. A shove is a shove, and a kick is a boost.

Q. As I understand a kick involves cutting off the cars? A. Cutting off the cars. [140]

Q. And a shove implies keeping the engine with the cars. A. Or shoving against the cars.

Q. Under a shove you keep the engine with the cars, is that right? A. Yes sir.

Q. Did Mr. Koefod give you the signal in the regular way? A. Yes sir.

Q. There was nothing different that you saw in his kick signal on that day in that particular operation from any other time? A. No sir.

Q. Had you conducted similar operations of that type that day? A. Many.

Q. Involving coming up here and kicking cars back. A. Yes, and on different tracks.

Q. This was no different than the others.

A. No sir.

Q. Mr. Richards, showing you defendant's identification No. 2, can you say what that picture represents? A. Lead track No. 7.

Q. Is that a switch shown there?

A. Yes, sir.

(Testimony of C. N. Richards.)

Q. Do you recognize which switch that is?

A. No. 7 switch.

Q. Does that picture show one or any of the switch points? [141]

A. It shows both switch points.

Q. Describe a little further what a switch point is. Is the switch point the end of the switch rail, that is, the point of the rail which the switch operates?

A. Yes sir.

Q. And the point is either thrown against the main track or thrown open?

A. Open, or closed.

Q. The point refers to the end of the switch track, is that correct?

A. Yes sir.

Mr. Hamblen: I offer Defendant's identification 2 in evidence.

Mr. Hanley: I'd like to ask a question.

Q. (By Mr. Hanley) There has been no difference—no change down there since February, 1939?

A. They were changing rails there the other day, but that didn't make any difference.

Q. How long ago?

A. About a week or ten days ago.

Q. When was this taken—

A. The track is just the same—

Mr. Hamblen: That was taken right after the accident. We will show that—

Mr. Hanley: When did you say this was taken?

Mr. Hamblen: This was taken immediately after



(Testimony of C. N. Richards.)

the accident, within a day or so. We will show that later on.

Mr. Hanley: I have no objection with that understanding.

Q. (By Mr. Hamblen) Were the rails changed at the [142] switch?

A. No. West of the switch they were changed.

Q. So far as you know the switch tracks are the same?

A. Just the same.

Judge Schwellenbach: Defendant's 2 may be admitted.

Q. Now, Mr. Richards, after you received this kick signal from Mr. Koefod you, as you say, released the brakes and then applied the reverse lever, is that correct?

A. I reversed the engine and released the brakes.

Q. I believe you testified you didn't ring the bell.

A. No sir, I did not.

Q. Explain that please.

A. I didn't think it was necessary. It was a momentary stop and I didn't think it was necessary to ring the bell at that time. It has not been the practice to ring the bell.

Mr. Hanley: Now, I didn't go into the question of custom or practice with him. I object to it and move the answer be stricken as to what he volunteered.

Mr. Hamblen: That's true, your Honor, he didn't go into the question of custom and practice. However, my thought was—he was asked to testify

(Testimony of C. N. Richards.)

as to whether he rung the bell and it seems to me on cross examination it is proper to have him explain why the bell wasn't rung. Of course inference has been left by Counsel that it should have been rung, and I think it's perfectly proper to go into the custom and practice as to whether he is required to ring the bell, or not.

Judge Schwellenbach: I think you are right so far as your case is concerned. But on cross examination, since there was no testimony, no interrogation about custom [143] and practice was made I think you are limited to the fact as to whether or not he did ring the bell, then you can recall him to testify in your own case. I will sustain the objection, and instruct the jury to disregard the testimony of this witness in so far as it refers to any custom or practice with reference to ringing the bell.

Q. Now, Mr. Richards, after this movement had been completed as I understand it you reversed the engine again and started up toward Division Street, or about to start up when your attention was called to an accident and you then ran the engine back down to where you saw Mr. Owens lying, is that it?

A. Yes sir.

Q. Were you the first one over to Mr. Owens?

A. I was practically the second one. You might say I was the one that was right there to pick him up.

Q. And Mr. Owens was lying outside the track, was he?

A. Yes sir.

(Testimony of C. N. Richards.)

Q. That would be south of the track?

A. Yes.

Q. Body and legs both?

A. Body and legs both.

Q. What did you do with reference to him?

A. I picked him up and held him in my arms until aid came soon after that.

Q. Did you assist in tying up his legs in any way?

A. I held him while the other boys was tying up his leg.

Q. Did he say anything to you? [144]

A. He looked down at his legs and said 'Dick, I am all done', and the ambulance came in a very short time. Mr. Koefod and Mr. Hinkle came there then.

Q. Mr. Koefod had gone down to call the ambulance?

A. To call the ambulance, yes.

Q. Did Owens say anything else to you?

A. That's all he said.

Mr. Hamblen: That's all.

Witness Excused

**WASHINGTON A. MAST,**

a witness called and sworn, testified as follows:

**Direct Examination**

By Mr. Hanley:

Q. (By the Court) What is your name?

A. Washington A. Mast.

Q. Where do you live?

A. 528 West Cleveland.

Q. (By Mr. Hanley) What is your occupation?

A. Garage operator.

Q. Where is your garage located?

A. 1619 North Division.

Q. What is the location of the garage with reference to the track that crosses Division street of the O. W. R. & N.?

A. I believe the O. W. R. & N.—

Q. Or Union Pacific, it's all the same. How many blocks are you away from it?

A. Practically five blocks.

Q. Did you know Mr. Owens during his lifetime? A. I did. [145]

Q. How long have you been acquainted with him?

A. Since May, 1919. In other words 9 years and 9 months.

Q. Did he live close to your place of business?

A. Just one block.

Q. You have known Mrs. Owens here that same length of time?

(Testimony of Washington A. Mast.)

A. Practically. I met her about thirty days afterward.

Q. Did you have any association with the decedent during his life time? A. Very close.

Q. What did that consist of with reference to industry and so forth?

A. Well, he always had a key to the shop. His house was straight west from the garage down the alley, in sight from the back windows. We have a machine shop there and he was a great hand as a machine man—he did rather neat work. He had some working equipment at home, and used to come to the shop and do quite a little lathe and machine work for himself, and some times he would help me and possibly do some welding. In other words we exchanged favors back and forth.

Q. No remuneration involved.

A. None whatever.

Q. Did he work all the time so far as you know—was he industrious?

A. Yes. Well, clarify that question.

Q. In your association with him, would you say he was industrious? [146]

A. Yes. He was laid off, apparently, very little. I can say that because in going to work when he didn't use a car he had a habit of coming thru with his lunch basket and visiting with me coming back and forth. Possibly not every day, but in that number of years I would be safe in saying I would talk to him not less than three times a week, and that

(Testimony of Washington A. Mast.)

probably is conservative. Sometimes he would be in the shop several times a day.

Q. Do you know his age?

A. I believe he told me his age was—I think he was four years older than I am, and I am forty nine at present.

Q. What would his age be at his death, if you know—if you don't know, say so.

Mr. Hamblen: I don't think that is a proper way to prove age, hearsay of an acquaintance.

Mr. Hanley: You are right, it isn't, unless he grew up with him.

Witness: I don't remember seeing his birth certificate. I don't say I haven't, neither will I say I have. He told me he was over fifty years of age.

Q. On the day of the accident did you see him that day?      A. I did.

Q. That was February 16, 1939.      A. I did.

Q. When did you see him?

A. Sometime after the middle of the afternoon.

Q. Where did you see him?

A. In the Sacred Heart hospital.

Q. About what time of day was it? [147]

A. It was after the middle of the afternoon. When it comes to hours I didn't check the exact time I left the shop. We all heard the testimony here in regard to the time of the accident. I could give it very close to the facts leading up to the time.

Q. What time would you say?

(Testimony of Washington A. Mast.)

A. Possibly thirty minutes from the time of the accident.

Q. That would be about 3:45?

A. Possibly a little more.

Q. Did you visit him in his room at the Sacred Heart Hospital?

A. I believe it was in the surgery he was in—I did.

Q. What was his condition from your observation of him?

A. Naturally being in the surgery he was entirely covered——

Q. Did you notice the condition of his face?

A. I did, but I would like to describe——

Q. Go ahead and describe.

A. I put in a lot of time in hospital handling cases—I came in the room—the man was covered—I spoke to him as I came in the room. His face was drawn——

Q. Was he conscious?

A. He was conscious and as clear as I am now.

Q. How long did you stay with him?

A. Four or five minutes probably. His face was very white——

Q. Just a moment—let me ask a question first. What was the appearance of his face as you observed it?

A. Very pale. I would say from loss of blood—  
[148] drawn—heavy lines across his face, and his

(Testimony of Washington A. Mast.)

eyes were, of course, rather bad, I would say from shock.

Q. You are not a physician? A. No.

Q. Have you had experience around hospitals?

A. I have put in many months in hospitals. I put in over a year over seas—I helped handle ambulance trains and have been around considerable suffering.

Q. Did he moan any while you were there?

A. Slightly, yes. As he turned his head—

Mr. Hamblen: I object to the witness volunteering. I am not objecting to any description developed by Counsel.

Q. You say he moaned?

Witness: May I ask Counsel a question?

Judge Schwellenbach: He asked you whether he moaned, and you said slightly—

Witness: I didn't hear Mr. Hamblen.

Judge Schwellenbach: He was objecting to your volunteering instead of answering the question.

Q. How long a time, Mr. Mast, were you with Mr. Owens? A. In the room?

Q. Is that the only time you were with him, is in the surgery? A. No, it was not.

Q. How long were you in the surgery with him? If you can estimate it how long were you in the surgery with him?

A. I was in the surgery with him four or five minutes.



(Testimony of Washington A. Mast.)

Q. Then you left the surgery? A. Yes.

[149]

Q. Then when did you see him the next time if you saw him at all?

A. Yes—I was paying very little attention to time——

Q. Did you see him again?

A. Yes, I went back to the room—I went back to the room twice after that.

Q. All right. The first time you went back to the room after that how long did you stay?

A. I was in the room with him probably two minutes that time.

Q. Did you talk to him at that time?

A. He was not conscious.

Q. When was that?

Q. Very shortly before he passed away.

Q. Then when was the next time you went into the room?

A. I went back into the room probably within two minutes of that time.

Q. Was he conscious then?

A. No, he was sinking.

Q. Did you see him after that?

A. I stayed in the room then.

Q. Were you there when he died?

A. If I interpreted the Sister's motion correctly I was. I believed that he was entirely gone when I left the room.

(Testimony of Washington A. Mast.)

Q. Did you at any time see any of the injuries he had?      A. I did not.

Mr. Hamblen: You may cross examine.

Cross Examination

By Mr. Hamblen: [150]

Q. You say Mr. Owens would come to your shop and work there after hours, after he got thru with his Union Pacific work?

A. Yes. He would come over and make something he was using at home.

Q. That would be in the evening?

A. That would be according to the shift he was working.

Q. Assuming he was working in the morning shift and got thru about two thirty or three, he would come over to your shop and work the rest of the afternoon?

A. Not necessarily. He might not come in for a month.

Q. Do you remember with reference to the time of the accident when he came to your shop to do this special work?

A. Oh, he hadn't been doing any work to amount to anything for a considerable time. He might have been in and worked, maybe, fifteen or twenty minutes, but no time to amount to anything.

Q. Do you know what he was working on the last time he was in there?

(Testimony of Washington A. Mast.)

A. I believe he was making some chisels for a wood lathe.

Q. What was he doing with this wood lathe?

A. He had a hobby—

Q. That was his hobby, working with a wood lathe?

A. Yes.

Q. Did he have a shop at his house?

A. A very fine shop.

Q. Did you go over there to see his work? [151]

A. Yes.

Q. He would work over there after hours?

A. He would bring little pieces over he was making—he brought me two or three minor items he made up.

Mr. Hamblen: I think that's all.

Witness Excused

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MRS. BERTHA A. OWENS,

a witness called and sworn, testified as follows:

Direct Examination

By Mr. Hanley:

Q. (By Judge Schwellenbach) You are Mrs. Bertha A. Owens?

A. Yes.

Q. You are a party, plaintiff in this action. Where do you live?

A. 1615 North Atlantic, in Spokane.

Q. (By Mr. Hanley) How long have you resided there or in Spokane, Mrs. Owens?

(Testimony of Mrs. Bertha A. Owens.)

A. Twenty six years.

Q. When were you married to the decedent?

A. December, 1915.

Q. Where were you married?

A. Nelson, British Columbia.

Q. Up to the time of his death you continued the marriage relation with the decedent?

A. I did.

Q. What was his occupation?

A. Railroad man.

Q. How long had he been a railroad man? [152]

A. Long before I married him.

Q. Where was he working when you married him?

A. On the S. F. & N. going into British Columbia.

Q. When did you move to Spokane?

A. In December, 1915.

Q. Has your residence in Spokane been continuous since then? A. Yes.

Q. When did he go to work, if you know, for the O. W. R. & N.? A. In April of 1917.

Q. Is that the same as the Union Pacific?

A. Yes.

Q. How long did he continue in the employ of the Union Pacific?

A. Continuously since that time.

Q. Up to the time of his death? A. Yes.

Q. In what capacity was he employed when he first went to work?

(Testimony of Mrs. Bertha A. Owens.)

A. He always has been a switchman.

Q. Do you remember when he was promoted to engine foreman?

A. Definitely I wouldn't know. Sometimes they are on there and then go back in the field.

Q. You have no definite knowledge?

A. No.

Q. How long had he been working as engine foreman if you know?

A. I couldn't begin to tell you—it's quite some years. [153]

Q. A number of years is it? A. Yes.

Q. Now, we will take the last year of his life, what was his salary?

A. Probably \$200 or \$225, according to how he worked.

Q. How often would he be paid?

A. Twice a month.

Q. How do you know?

A. Because I got most of his money.

Q. Would he be paid by check? A. Yes.

Q. How much of the money each month, or each pay day, did he give you? A. About \$75.

Q. And that would approximate how much a month? A. \$150.

Q. He would be paid twice a month—when was his pay days?

A. The 3rd and the 16th of each month.

Q. What did he do with the rest of the money? What was done with the money?

(Testimony of Mrs. Bertha A. Owens.)

A. Well, I wouldn't know what he did with his other than spend it for his hobby.

Q. Out of the money he gave you, you say about \$150, did any part of that money go for the support of your house?      A. Yes.

Q. How much did you pay out of that approximately?

A. Well, I used quite a lot of it. [154]

Q. How much of it, if you know, toward his support?

A. Well, I wouldn't know how much—how to tell you that, Mr. Hanley. You mean in the way of clothes?

A. No, I am talking about expenses in the support of your house. What I am trying to get at is about how much of that \$150 he gave to you went back for his use and benefit. He had to live. Did he board at home?      A. Yes.

Q. Can you estimate what was your grocery bill a month, if you know?

A. Well, my family isn't as big now as it was. Probably \$35 or \$40—maybe less, maybe more.

Q. Average \$35, would you say?

A. Yes. That's just the grocery. That isn't milk or meat.

Q. Did you live there yourself. You get your board out of that \$35?      A. Yes.

Q. Who else was there?      A. My son.

Q. He was kept, also, out of that?      A. Yes.

Q. What were the total household expenses?

(Testimony of Mrs. Bertha A. Owens.)

A. I would imagine about a hundred dollars.

Q. Hundred dollars a month?

A. Some months more and some months less, according what we had to take care of.

Q. That hundred dollars—what did it go for each month? A. Clothing.

Q. Your clothing? A. For all of us. [155]

Q. Did you buy his also?

A. No, he bought his own clothes out of the balance of the money.

Q. Then it would be——

A. My son and I.

Q. What I would like to get at is how much net you got out of his contribution. You got your living——

A. You want me to state how much I saved?

Q. No. How much he contributed toward your own support—what you actually received, or received the benefit of in money.

A. I received a hundred and fifty dollars—that was mine to do as I liked with, providing the bills were paid.

Q. All right. What were the amount of the bills?

A. About thirty five or forty dollars a month insurance.

Q. Who was that insurance on?

A. Mr. Owens, my son and I.

Q. How much of it was yours?

A. At that time it was about \$7.00 a month.

(Testimony of Mrs. Bertha A. Owens.)

Q. That went toward your insurance?

A. My own insurance.

Q. Then what would you estimate the amount of the household expenses that went for your benefit?

A. I presume about \$50.

Q. Then the rest of the \$150, would you get that, or where did that go? Was that for your benefit?

A. Just for the general up keep of the home.

[156]

Q. Did you spend it for that?

A. Yes, I did.

Q. Do you know what it was for?

A. Just the household expenses and general living.

Q. Did you spend it for your own use and benefit or did it go for him or your son?

A. For the three of us.

Q. You can't—

A. I can't segregate it.

Q. The entire amount went for the three of you? The \$150—then it comes to this he received fifty or seventy-five dollars over and above that for himself—he kept that?

A. Yes.

Q. What was your light bill?

A. About \$3.50.

Q. And water?

A. About three dollars a quarter—more in the summer time.

Q. That would be a dollar a month.

A. Yes.



(Testimony of Mrs. Bertha A. Owens.)

Q. And your milk bill?

A. My milk bill was about twelve dollars a month.

Q. Did you have taxes on your home?

A. Yes.

Q. How much were those a year?

A. At that time they were about fifty dollars a year.

Q. Approximately \$4.25 a month.

A. Yes sir. [157]

Q. And the insurance—your insurance was \$7.00 a year? A. No, a month.

Q. A month—pardon me—was any insurance paid on the son's life? A. Yes.

Q. How much was that, do you remember?

A. He has one policy that is \$85 a year.

Q. That's \$7.00 a month.

A. Then he has two others, just a little industrial policy.

Q. \$1.00 a month?

A. Yes, a dollar a month.

Q. Now, your husband—was that insurance paid by you out of that \$150? A. Yes.

Q. How much was it a month?

A. About \$15.

Q. That totals around \$79 a month that was spent for the three of you, and that's not including your insurance of \$7.00 a month. So you still have your \$7.00 you paid toward insurance, and ap-

(Testimony of Mrs. Bertha A. Owens.)

proximately \$70 in cash. You got that yourself, I take it?      A. Yes.

Q. Now, did you use about one third of what your living cost is.

A. I presume that much.

Q. That would be about \$25 you would receive benefit [158] from. That would make his contributions to you about \$95 a month, is that about right—you got the benefit of?      A. Yes.

Q. Did those contributions continue all during your married life?      A. They did.

Q. While he was working?

A. While he was working.

Q. Did he work all the time during your married life?

A. Only at times we had vacations, and he laid off for a day or week or two at a time.

Q. Did he show any evidence of industry around the house?      A. Yes.

Q. What doing?

A. The up keep of the home—tinkering as usually the head of the house has to do—he also had his work shop he was very much taken up with.

Q. What were his habits with reference to sobriety?      A. Very good.

Q. Was he sober?      A. Very.

Q. Now, on the day of the accident did you see him at all that day?

A. Not until he was unconscious.

Q. When was that?

(Testimony of Mrs. Bertha A. Owens.)

A. About two minutes before he died.

Q. You were at the hospital then?

A. Yes.

Q. What was his age? [159]

A. Fifty three.

Q. Was that at the time of his death in February?

A. About two weeks previously—he had a birthday.

Q. How old were you in February, 1939?

A. Forty-four.

Mr. Hanley: You may cross examine.

#### Cross Examination

By Mr. Hamblen:

Q. Mrs. Owens, I suppose your household was run the same as most households are run.

A. Yes sir.

Q. You paid your cost bills each month, and if there was anything left over that went to you.

A. Yes sir.

Q. These estimates you have given are more or less estimates—you don't pretend they are accurate, do you?

A. I do not.

Q. Was your son of age during this time?

A. He became of age February 3, 1939.

Q. Just before the accident.

A. Just before.

Q. Does he still live with you?

A. No, he is living in Portland.

Q. You spoke about your husband's hobby. He had a shop there in the house?

(Testimony of Mrs. Bertha A. Owens.)

A. No, in the garage back of the house.

Q. What was his hobby?

A. Wood working.

Q. He was doing that after hours?

A. Yes. [160]

Q. Did he work nights on that?

A. Not nights. It was just a hobby with him. He enjoyed it. It wasn't labor for him.

Q. Sort of play? A. That's all.

Q. He would work out there in the evening?

A. Quite often.

Q. I would like to ask, Mrs. Owens, what Mr. Owens' health was during those two years—during the last two years. A. Very good.

Q. Anything the matter at all with him?

A. Not that I know of.

Witness excused

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Jury was excused temporarily and the following proceedings were had:

Mr. Hanley: Counsel for the defendant and myself have agreed that whatever the American Experience Tables of Mortality show as to life expectancy shows is correct.

Judge Schwellenbach: You stipulate I may instruct the jury whatever that shows.

Mr. Hanley: That a man of fifty three would have that life expectancy, and with that the plaintiff rests.

Whereupon Court adjourned to convene at 1:30 P.M., at which time, all parties present, the following proceedings were had. [161]

Before the Jury was returned to the box, the following proceedings were had:

Mr. Hamblen: If your Honor please, plaintiff having fully rested her case, Defendant now moves the Court for a dismissal of this action on the ground and upon the facts and the law the plaintiff has shown no right of relief as to either cause of action. More specifically, the grounds of our motion are that the plaintiff's evidence and testimony shows no negligence on the part of the defendant railroad, or its employees, and further, that the evidence shows no causal connection between any alleged act of negligence and the injury to plaintiff's decedent, and, further, that the evidence shows as a matter of law that plaintiff's decedent, Leyle F. Owens, was familiar with his duties, and as engine foreman fully knew what was going on in the yard and assumed the risk of the injury which occurred which resulted in his death.

#### Discussion

Judge Schwellenbach: In this case the evidence as to negligence is not as satisfactory as we might desire. It may be after listening to all the testimony I will decide to submit the case on some other of the five grounds that are contained in plaintiff's complaint. As far as allegation (a) paragraph 5 is concerned, the testimony shows that several of

the witnesses testified that it was the custom to look out for each other. Now, I don't think that testimony is sufficient to show negligence upon the part of the defendant, or the failure to have a lookout. The words 'to look out for each other' in the testimony, as I view it, the word [162] 'look out' is a verb and does not apply to the term 'having a look out', and at the present time I don't see how I can submit that question to the jury.

Now, (B), they failed to give warning. So far as the testimony shows here there is no custom to give a warning to employees in the switch yard. They do have the responsibility of a higher degree of care in taking care of themselves than the general public. There is no common law duty, as I read the cases.

(C) That the defendant and defendant's yardmen failed and neglected to receive a hand signal from plaintiff's decedent before signalling defendant's engineer to kick or move the aforesaid cars:

I don't think under the testimony there was any necessity for further hand signals. The decedent, Owens, had orally instructed the field switchman to kick back those two cars and had the right to apprehend they would be kicked back. There was no necessity, in view of the fact hand signals were to be given on that side of the engine where the engineer was located.

(E) I don't see anything involving the question of a safe place to work. There is no contention the

yards were not properly located, or situated, or that the place of working was not entirely safe.

However, the Company itself adopted the rule—rule 30—‘The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, stations, tunnels and snow sheds’. That is a positive rule adopted by the Company. The defendant has cited a number of cases, including two cases [163] from the United States Supreme Court, The Toledo Railroad case against Allen, as I read it, is a ‘safe place to work’ case. A man was there by the side of the track, and he knew the situation about the trains going by, and if he was entitled to recover it was on the ground the tracks were too close together, and the defendant Railroad Company had not provided him with a safe place to work. Although the language of that case may be used, may be of some value in this case, nevertheless, in its final analysis it is a ‘safe place to work’ case. And the other Supreme Court case, that of the Topeka & Santa Fe against Toops, the case in which the conductor in charge was found after the train had passed on. There was no evidence as to just exactly what happened, and what the Court really did was say they were not going to let the jury guess what was the cause of his death. The Supreme Court said what actually took place can only be surmised, and what the Supreme Court decided in that case was it would not permit a jury to guess in a case of that kind. There, again, you have language which would

indicate that the defendant's motion might be well taken. However, in the case of Atchison T. & S. F. Ry versus Ballard, in 108 Federal, the rule is laid down that where the railroad company adopted a specific rule as differentiated from the general rule, that a violation of that rule becomes negligence.

Now, getting down precisely to the question of this rule 30; I don't feel that either of the decisions of the Supreme Court of the U. S. passed upon it.

[164]

Now, its true that in this case of Aerkfetz vs. Humphreys, (145 U.S. 418) that the Supreme Court used the language that under the facts in that case the ringing of the bell or blowing or sounding of a whistle would be confusing rather than helpful, but that is limited to the facts in that case, and when in a later case Justice Butler referred to this case. He was referring to a man who was working beside the track, a place which was inherently dangerous; he knew it was dangerous, and pointed out that the ringing of the bell would have been of no value to him. It seems to me a closer case is the case of Gildner vs. B & O Railway, 90 Federal (2), 635, and it's an opinion written by a man whom I think is as great a judge as there is in the United States today, or has been for a good many years, with all due respect to some of the great judges, and in this case the rule was 'a bell will be rung when the engine is about to move'; then, 'thru tunnels', 'along streets', 'approaching or passing public roads'. Exactly the same rule as contained in rule 30 of



the defendant company. Judge Hand refers to the *Aerkfetz vs. Humphreys* case in this language: 'The indiscriminate ringing of bells in a switch yard has been disapproved by the Supreme Court as tending rather to confuse than to warn'—then citing some cases—'the first clause required the bell to ring only at the start'. Very clearly indicated the ringing of the bell in this case as it was about to move would not have a tendency to confuse, but would rather warn. He then proceeds to discuss the conflict in the evidence in that case as between the various men working in the yard and ends up with this [165] statement: 'the convenient and safe way is to ring the bell whenever the engine moves, and the rule ought to be so understood'. In the light of Judge Hand's decision in that case, and the absence of direct decisions by the Supreme Court of the United States, I feel there is evidence here of negligence on the part of the defendant because of the failure of its employees to comply with the rule which the defendant company had adopted. Clearly there is a causal connection—if Mr. Owens was relying—if we presume he was taking every care for his own protection and was relying on that rule, and he had a right to rely upon thinking the bell would be rung when the engine was about to move, and the engine was close enough to him so if the bell had been rung he could have heard it, then there certainly is a causal connection between his accident and the failure to ring the bell.

Now, that brings us to the two affirmative defenses. Contributory negligence under this statute is not an absolute defense. It's one in mitigation of damages, and the defense of assumption of risk. It's true that an employee of a railroad company working in a switch yard assumes a much higher degree of risk than an employee working in the office up stairs, but the rule of assumption of risk is an employee assumes the ordinary risk of his employment. Now, if there is a responsibility upon the company to have this bell rung before the engine could be moved, it cannot be said to be ordinary risk of his employment to have an engine back up toward him without the bell being rung. [166]

Plaintiff has submitted testimony to the effect it was the custom to see the switch handle in place before giving the signal to proceed onto and thru the switch. I can't submit that as a question of negligence upon the part of the defendant because the testimony of all the witnesses is the purpose for which they would look at the switch was to see whether the switch was locked and was not intended for the purpose of protection of other employees in the situation of the decedent. I have not decided as yet whether it goes into the matter of assumption of risk, or not. Since the evidence shows that was a custom I will submit that as a question of fact for the jury, whether, on the question of assumption of risk Mr. Owens had the right, if they should find that was the custom, and this field switchman would have had to walk up beyond the end of the cars in

order to see the switch and see whether it was locked or not. It may be that is a matter which should be submitted to the jury upon the question of assumption of risk. I will be glad when the time comes for preparation of instructions to hear from you gentlemen further on that question.

There have been submitted, according to my view, two lines of evidence on the matter of negligence, one, failure to ring the bell on the basis of the rule, and two, failure of the field switchman to go up beyond the cars to see the switch. The various witnesses who have testified as to the custom of seeing the switch before giving the kick signal, the purpose of it was to see whether or not the switch was locked and to see whether [167] or not it was safe for the cars to go over, and since that was the purpose of this custom, if it was a custom, clearly Mr. Owens could not claim any benefit under that because it wasn't intended for his benefit. What I am wondering about is whether or not that isn't a question to submit to the jury on the question of assumption of risk. I will deny the motion. [168]

Mr. Hamblen: If your Honor please, Gentlemen of the Jury:

At the outset we are a little bit embarrassed as it seems to me that the plaintiff has stolen most of our thunder, and practically proven our case. I will be very brief and try, in presenting our witnesses, not to duplicate the testimony that has been offered by the plaintiff although most of the witnesses being

members of the train crew will be witnesses I will call, and I am going to show by members of the train crew that the ringing of the bell in switching operations in the yard is not done. That the bell is not rung in connection with switching operations. I am going to offer testimony of members of the crew that in making this movement Mr. Owens, as the engine foreman, was in charge of all of these switching operations—it is all done under his direction and at no time during the time he was engine foreman did he ever require the bell to be rung when switching was being done. I am going to show that in a switching operation of that kind that Mr. Owens, in going across the track and throwing that switch should have remained there on that side at or near the switch until those two cars which he ordered to be kicked down, were kicked down and out of the way. I think the testimony on that will be conclusive. In addition to that testimony we will show by the Superintendent, Mr. McCarthy, and by Mr. Pidecock, Yardmaster, and by Mr. Lang one of the engine foreman, that in the understanding and interpretation of the rule which has been offered in evidence here, being [169] rule 30, it was not interpreted to apply to switching operations. The defendant will offer no evidence in regard to damages, or anything of that kind, and we believe when we have presented this evidence to you we will be justified in expecting a verdict at your hands.

R. L. DAVIS,

a witness called and sworn, on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Hamblen:

Q. (By the Court) You may state your name.

A. R. L. Davis.

Q. Where do you live? A. Spokane.

Q. (By Mr. Hamblen) Mr. Davis, what is your employment with the Union Pacific Railroad?

A. Civil Engineer.

Q. How long have you been so employed?

A. Twenty four years.

Q. At my request did you prepare a drawing showing the layout of the switchyard here in Spokane? A. I did.

Q. That's a part of the old yard.

A. Part of the old yard.

Q. This drawing behind you, is that the drawing you made? A. It is.

Q. State whether that is drawn to exact scale.

A. It is.

Q. What is that scale? [170]

A. One inch to twenty feet.

Q. What is the square shown down there just south of the several tracks there?

A. The yardmaster's office.

Q. Is that located at the proper location?

A. It is.

Q. Those tracks north from there are numbered.

(Testimony of R. L. Davis.)

A. Yes sir.

Q. Those are the numbers by which those tracks are known?      A. Commonly known, yes sir.

Q. That map is drawn in the regular manner as to directions—north at the top, south at the bottom, west to the left and east to the right.

A. Yes.

Mr. Hamblen: That is all.

Mr. Hanley: What do those lines represent standing out there?      A. Switch stands.

Mr. Hanley: That is all.

Witness excused

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I. E. PETERSON,

a witness called and sworn, testified as follows:

Direct Examination

By Mr. Hamblen:

Q. Your name is I. E. Peterson?

A. Yes sir.

Q. Where do you live?      A. Spokane. [171]

Q. I hand you exhibit No. 2 which is a picture of the switch points in controversy here, and will ask you whether or not you took that picture.

A. Yes sir.

Q. What date did you take it?

A. February 17, 1939.

Q. That is the switch involved in this suit?

(Testimony of I. E. Peterson.)

A. Yes sir.

Mr. Hamblen: You may inquire.

**Cross Examination**

By Mr. Hanley:

Q. Mr. Peterson, there is snow on the ground in that picture, that is snow there, isn't it, it looks like it.

A. Yes, I think that is snow.

**Witness Excused**

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**P. T. McCARTHY,**

a witness called and sworn, testified as follows:

**Direct Examination**

By Mr. Hamblen:

Q. Your name is P. T. McCarthy.

A. Yes.

Q. Where do you live? A. Spokane.

Q. What position do you occupy with the Union Pacific Railway Company?

A. Superintendent of the Washington Division.

Q. How long have you been employed by the Union Pacific Railway?

A. Twenty seven years. [172]

Q. In what capacity have you been so employed?

A. Started as messenger boy, telegraph operator, station agent, engine watchman, train dispatcher, train rule examiner, train master, assistant superintendent, and superintendent.

(Testimony of P. T. McCarthy.)

Q. In February, 1939, where were you employed?

A. Superintendent of the Washington Division of Spokane.

Q. Now, Mr. McCarthy, you said you had been rules examiner.

A. Yes sir.

Q. When was that?

A. In 1933 to October, 1934.

Q. Just what were your duties as rules examiner?

A. Why the rules examiner interprets the rules, various rules in the book of rules, including transportation, maintenance of way, round track rules, and examines all the engineers on the transportation and maintenance of way department in connection with those rules.

Q. Does that include switching crews?

A. Yes.

Q. What does that examination consist of?

A. To refresh the memory of the employees to see whether or not they still recall what is in the book of rules, asking questions to see whether they have the answers correct.

Q. At that time while you were conducting these examinations did the rule book contain what is now rule 30 in the present book? [173]

Q. Did you, as superintendent, have anything to do with the making of that rule?

A. The superintendent has practically all the making of the book of rules with the help and ad-



(Testimony of P. T. McCarthy.)

vice of his assistants, train master, chief despatcher and so forth.

Q. Did you have anything to do with the making of rule 30?

A. It was an old rule we accepted.

Q. What did you have to do with making the rules in the new book?

Mr. Hanley: That is objected to as incompetent, irrelevant and immaterial.

Judge Schwellenbach: I think the objection is well taken in this case.

Q. Now, Mr. McCarthy, the switching crew is under the supervision or direction of the superintendent? A. Yes sir.

Q. Did you know Mr. Owens? A. Yes sir.

Q. How long was he employed as engine foreman, if you can tell approximately?

A. I believe he was admitted in '23.

Q. What was his position prior to that time?

A. As switchman.

Q. Did he continue from 1923 up to the time of his death as engine foreman?

A. To the best of my knowledge, I believe he did.

Q. Explain, briefly, the duties of engine foreman.

A. Well, an engine foreman has direct supervision [174] over the engine he is working. He has full charge of all work done by that crew and all

(Testimony of P. T. McCarthy.)

members of that crew—take their instructions from him.

Q. He is in complete charge of the crew?

A. Complete charge.

Q. Where does he get his instructions from?

A. In connection with the switching he gets it from the yard master.

Q. Who is the yard master here?

A. Pidcock.

Q. Now, Mr. McCarthy, assume that at the time that Mr. Owens met with his accident a movement of an engine backing up pulling two box cars had been drawn over a switch into the main lead, drawn over it easterly, and that a kick movement of the two cars was to be made and assume that Mr. Owens dropped off at the switch and gave the engineer the sign to stop, and stepped across and turned the switch, lined it up so that the cars could go on track 13—state what was the usual and customary procedure for Mr. Owens to follow in connection with that movement?

Mr. Hanley: That is objected to on the ground there is no qualification of this witness shown to pass on that.

Mr. Hamblen: He was superintendent here.

Mr. Hanley: I didn't understand him to say he ever had an experience switching in the yard. He does have employees working under him in the yard, but no qualification as yet has been shown

(Testimony of P. T. McCarthy.)

he has ever had any experience in yard service as engine foreman, or otherwise. [175]

Q. (By Mr. Hanley) Did you ever have any experience as a switchman?

A. Not as switchman. I did as brakeman.

Q. That was in road service?

A. Years ago on work train service.

Q. But you have never worked as switchman in the yards?

A. Not as switchman. I have had direct supervision over them.

Q. As an engine foreman did you ever work in the yards? A. No sir.

Q. How long were you a brakeman?

A. I worked one summer on the Grant Smith work trains on the Oregon Division, about 1914, or '15.

Q. At that time you worked for a construction contractor? A. Yes.

Q. The work you did was in connection with the building of some road? A. That's true.

Q. And hadn't been turned over to the operating department until completed. A. No.

Judge Schwellenbach: I will overrule the objection.

Q. (By Mr. Hamblen) As superintendent are you familiar with the uses and customs employed by switchmen in the operation of their trains in switch yards? A. Yes sir.

Q. And have observed them many times?

(Testimony of P. T. McCarthy.)

A. Many times.

Q. And are familiar with the custom and practice. [176]

A. I think I have rode every switch engine there is in the Spokane yard at different times and observed fully all of the work that the men do in the yard.

Judge Schwellenbach: The objection is overruled.

Q. Do you recall the question?

Question Read: "Q. Now, Mr. McCarthy, assume that at the time Mr. Owens met with his accident a movement of an engine backing up pulling two box cars had been drawn over a switch into the main lead drawn over it easterly and that a kick movement of the two cars was to be made and assume that Mr. Owens dropped off at the switch and gave the engineer the sign to stop and stepped across and turned the switch, lined it up so the cars would go on track 13—state what was the usual and customary procedure for Mr. Owens to follow in connection with that movement.

A. With one man left to pass the signal, Mr. Owens should have remained at the switch until the movement was completed.

Q. In switching movements in the yards what is the fact with reference to the ringing of the bell?

Mr. Hanley: Object to that—the rule speaks for itself.

Mr. Hamblen: I am asking him with reference to the ringing of the bell. What was done with re-

(Testimony of P. T. McCarthy.)

gard to the ringing of the bell. If there is a rule that governs it and it wasn't rung, of course there was a violation of that rule. I am asking him what was the custom.

Mr. Hanley: There is an admission in the pleadings there is such a rule. [178]

Judge Schwellenbach: Members of the Jury: I always feel that the jury is entitled to know why the Court makes a ruling. In this case I have decided to submit to your consideration as a question of negligence rule 30, which is referred to in Plaintiff's complaint, and which is admitted in evidence as one of the rules under Plaintiff's Exhibit B. I will instruct you as to that rule in so far as the question of claim of negligence on the part of the defendant Railway Company is concerned. I am going to permit this witness to answer in reference to the question. If the testimony should not show that Mr. Owens was brought into knowledge of that custom you will disregard all of that testimony in reference to any custom. If the testimony shows that Mr. Owens had knowledge of it you will consider it, not upon the question of claim of negligence on the part of the defendant, but solely relative to the affirmative defenses which the defendant has interposed here and consider the evidence solely from that point of view, and not from the point of view of claim of negligence on the part of the defendant. The objection is overruled.

A. In ordinary switching movements the bell is never rung.

(Testimony of P. T. McCarthy.)

Q. Was it rung during the period that Mr. Owens was working as engine foreman?

A. It was not, only over street crossings.

Q. Now, Mr. McCarthy, in your interpretation of that rule 30 as superintendent will you state whether in your opinion it applies to switching movements? [179]

Mr. Hanley: That is objected to and calling for——

Judge Schwellenbach: I will sustain the objection.

Mr. Hamblen: That, of course, raises the question we have discussed. May we approach the Bench?

(Colloquy at the Bench.)

Mr. Hamblen: At this time, in view of the Court's ruling on this question we will offer to prove by Mr. McCarthy that, as superintendent, rule 30 was interpreted not to apply to switching movements in the yards, and to further show that the rule applies only to thru train movements and to movements where the street is being approached, or if there is something unusual in the yards to which the engineer wishes to call attention. That this interpretation of the rule is general thruout the Union Pacific System, and that in none of the switch yards in the Union Pacific System, including the old yard in the city of Spokane, has the rule ever been applied to require the ringing of the bell on switching movements. In addition to that offer of proof of the above by Mr. McCarthy I wish to offer the same proof by Mr. Rutherglen, who is the safety agent of

(Testimony of P. T. McCarthy.)

the Union Pacific system in the Northwest, and also by Mr. Pidcock who is yard master for the Union Pacific system in the switching yards in Spokane, and also by each member of the train crew operating at the time of the accident under Mr. Owens. And, also the same evidence will be given by Mr. F. H. Lang, who is engine foreman of one of the crews in the switching yard in Spokane.

Mr. Hanley: I object to it on the ground irrelevant, [180] incompetent and immaterial in view of the fact there is an admitted rule that governs the ringing of the bell when the engine is about to move.

Judge Schwellenbach: I will sustain the objection in so far as the offer of proof concerns the rule and the interpretation thereof. I am not changing my ruling which I outlined to the jury to the extent if you can bring the knowledge of the custom within the yards to the knowledge of Mr. Owens. That will be admitted upon the matter of your affirmative defenses.

Q. Mr. McCarthy, was there a generally recognized practice followed in the switching yard in Spokane with reference to the ringing of the bell in switching movements?      A. Yes, there is.

Mr. Hanley: That is objected to on the same ground, incompetent, irrelevant and immaterial.

Judge Schwellenbach: The same ruling. It will be admitted at this time subject to being connected up with Mr. Owens.



(Testimony of P. T. McCarthy.)

Q. What was that practice?

A. In ordinary switching movements the bell is not rung except when crossing over street crossings.

Mr. Hamblen: I think that's all.

Cross Examination

By Mr. Hanley:

Q. Mr. McCarthy, I understood you to say the bell is never rung in switching movements.

A. In making ordinary switching movements I have never noticed it. [181]

Q. Are you in the yards all the time, or do you have jurisdiction clear around to Pendleton?

A. Jurisdiction all over.

Q. How much of the time do you spend in Spokane?

A. Well, I would say twenty-five per cent of the time.

Q. Now, in connection with your duties, you have an office force?      A. Yes sir.

Q. And when you get in off the road you have considerable work piled up for you to do?

A. I have some work. I have a chief clerk who takes care of a lot of it.

Q. You don't have much time to spend out on those switch engines, do you?

A. I have enough time. I am around in the various yards in this Division. There isn't a yard I haven't visited at least once a month and observe the work being performed. I am in the Spokane



(Testimony of P. T. McCarthy.)

yard here three times more than in any other yard in the Division.

Q. Then you usually go in there when there is a complaint—delay in getting a train made up, or something of that kind?

A. No, sir, I don't.

Q. You just make a general tour of inspection?

A. Yes sir.

Q. You really didn't mean it when you said the bell was never rung—in switching movements. You didn't mean to say that. What you meant to say so far as you observed the times you were around, is that right? [182]

A. I have been around in all the yards of this northwest district which includes Seattle, and the big yard at Albina where they have thirty engines working, and I never yet observed a bell being rung in these short movements.

Q. Don't you hear that bell being rung constantly in the Albina yard?

A. No. In coming out of the round house they do, or going across streets, but out in the battle-field where they make and break up trains you don't hear any.

Q. You stated in your opinion Mr. Owens should have stayed over right at the switch because Koefod was on the engineer's side and it was the place of Koefod, or the man on the engineer's side to give the signal. A. Yes sir.

(Testimony of P. T. McCarthy.)

Q. You further testified that Owens was the engine foreman and his duties were to be in charge and he was in charge of the entire engine crew.

A. Yes.

Q. And he gave signal instructions and directions for the operation of the work in connection with this crew.

A. He gave the instructions, not always the signals. Other members of the crew——

Q. They pass signals——

A. And give signals.

Q. But the work is done directly under the foreman, isn't that true?      A. Yes.

Q. Under the circumstances it would—under this rule 7-a 'When practicable all signals by hand must be given on the engineman's side; flag and lamp signals (when not [183] by hand), fuses and torpedoes must also be placed on that side, but they must be respected when received from or when found on either side'—Now, under that rule it would have been Foreman Owens place to have gone on the engineer's side to give the signal, isn't that true?

A. Not in that case. When he went over to change the switch he left the other man there to give the signal.

Q. Did you make an investigation after this happened?      A. Yes.

Q. You went down and looked over the cars, and so forth, and the ground?      A. Yes.

(Testimony of P. T. McCarthy.)

Q. Was there anything said to you in that investigation regarding the fact that those cars were going to be left there and not kicked into—that they were going to be added to the cars standing there and coupled onto the entire train they were making up there, which they were getting ready to depart from Spokane—was anything said about that?

Mr. Hamblen: That is objected to as not proper cross examination.

Judge Schwellenbach: Objection sustained.

Q. You say it was Mr. Owens' place to throw the switch and stay there?

A. When he went on that side, yes.

Q. Wasn't it Mr. Koefod's place to see that the switch was properly thrown before he gave the kick signal, and what I mean by 'properly thrown', that the handle of the switch was pulled clear around and dropped [184] into the slots so that it would remain there and no chance for the switch points to split when the cars went over them?

A. If Mr. Koefod saw the switch points over he knew Mr. Owens had made the switch and Mr. Owens being an experienced man would certainly have the handle in the slot.

Mr. Hanley: I would like to have the question read.

Question read.

A. No sir.

Q. Wasn't it his place to do that?

A. No.

(Testimony of P. T. McCarthy.)

Q. Just the fact that he saw the switch points that was sufficient?      A. Yes sir.

Q. Did you examine the switch points?

A. I did. It was two days later when I got back to Spokane.

Q. They were not flush with the top of the rail?

A. The ends are not usually, not except on new switch points.

Q. That was fairly worn at that time?

A. Slightly worn.

Q. The points were below the top of the rail.

A. Very slightly. As the switch points move they move about two or three inches and are clearly visible.

Q. They don't lock against the rail until the handle of the switch is completely turned in the direction you are going to throw the switch and dropped into the slot, do they?

A. Well, the point goes up against the rail to insure [185] its staying there.

Q. That's the proper way to throw the switch, isn't it?

A. Yes, throw the switch over entirely.

Q. Throw it completely to lock it.

A. Yes sir.

Mr. Hanley: That's all.

Witness excused.

D. B. PIDCOCK,

having been called and sworn, testified as follows:

Direct Examination

By Mr. Hamblen:

Q. Where do you live? A. Spokane.

Q. What position do you occupy with the defendant, Union Pacific Railway?

A. General yard master.

Q. Where is your office?

A. I have two offices, one in the old yard and one in the new yard.

Q. In the old yard where is your office?

A. It's located just east of the freight house.

Q. Now, Mr. Pidcock, how long have you been yardmaster? A. Four and a half years.

Q. And that has been in Spokane?

A. Yes sir.

Q. What did you do prior to that time?

A. I was conductor.

Q. Conductor on a freight or passenger?

A. Freight. [186]

Q. What other experience have you had?

A. Yard man and brakeman, prior to that station agent, telegraph operator at Caldwell.

Q. What are your duties as yardmaster here in the city of Spokane?

A. General supervision over all movements in the yard.

Q. Just explain what that means. What do you do?

(Testimony of D. B. Pidcock.)

A. Well, I instruct the engine foremen as to their duties in making up trains, marking switch lists, general instructions as to the movement of empties, different roads where destined to, seeing the spotting of industries is properly performed, and supervision over the observance of the rules and so forth.

Q. Did you know Mr. Owens?

A. Yes sir.

Q. How long had you known him?

A. Three years and about five months.

Q. And during that time how closely did you come in contact with him?

A. Daily contact, giving him instructions and so on.

Q. As engine foreman would he be the one to whom you would give orders for switching of cars?

A. Yes sir.

Q. Do you recall how many of those switching engine crews you had in the yard there?

A. At the time of the accident?

Q. Yes.

A. There were two engines in the yard at that time.

Q. And Mr. Owens was in charge of one of the crews? [187]

A. Yes sir.

Q. Just what were his duties as engine foreman of that crew?

A. The engine foreman has supervision over all members of his crew to perform the work given

(Testimony of D. B. Pidcock.)

him by the yard master in making up of trains and busting up of trains, as we call it, in the yard.

Q. Were you familiar with the way he did his work?      A. Yes sir.

Q. And the way the engine crew did their work?

A. Yes sir.

Q. Were you familiar with the orders given in the movement of trains?      A. Yes sir.

Q. Mr. Pidcock, assume that at that particular movement the engine backed up easterly toward Division Street pulling two box cars over No. 7 lead there on the old main line lead, and that the movement was to kick two of those cars on track 13, then pull over to the Pendleton and pick up a car there. Assume that Mr. Owens was riding on the north side of the first box car and as he approached the switch referred to he dropped off and gave the signal, the sign to stop, then crossed over and turned the switch—state to the jury what the usual and customary thing for him to do after he turned the switch—what was the usual and customary thing to do?

A. The man that would cross over to get the switch, barring a definite understanding he would return, would stay on the side the switch was on until the movement was [188] completed. He would not return until the movement had been completed.

Q. Until the cars had rolled past him?

A. Yes sir.

(Testimony of D. B. Pidcock.)

Q. Now, what is the general custom in the yard there with reference to the bell ringing when switching movements were being made?

Mr. Hanley: That is objected to as incompetent, irrelevant and immaterial. An attempt to controvert a written rule of evidence, and admitted, which is a matter of law for the court to construe.

Judge Schwellenbach: It will be admitted if connected up with Mr. Owens.

A. The bell is never rung in the ordinary switching movement.

Q. Now, during the time that Mr. Owens was working there did you see him making switching movements when the bell wasn't ringing?

A. Many times.

Q. That is the usual and customary way he operated? A. Yes sir.

Q. Was it within his power as engine foreman to have the bell rung if he wanted it?

Mr. Hanley: That is objected to on the same ground. The rule governs.

Q. May I qualify that for a moment. Mr. Pidcock, just what authority did Mr. Owens have over this switching over which he was engine foreman?

A. Complete authority. [189]

Q. That extended to the engineer and fireman and other helpers? A. Yes sir.

Q. That crew consisted of Mr. Owens, Mr. Koe fod, Mr. Hinkle, Mr. Richards and Mr. Seals?

A. Yes sir.



(Testimony of D. B. Pidcock.)

Q. Mr. Seals was fireman? A. Yes sir.

Q. Under the plan under which he operated they would have to obey any order he gave.

A. Any order except, of course, the violation of the rule.

Q. Was it within his power as engine foreman to direct the ringing of the bell if he cared to have it rung? A. Yes sir.

Mr. Hanley: I object to that and move to strike the answer.

Judge Schwellenbach: I am going to let the answer stand with the instruction to the jury that the testimony only goes to the question of whether or not Mr. Owens himself was guilty of negligence, or assumption of risk, as claimed in the affirmative defenses. The theory upon which I do that, Mr. Hanley, is this. You have a rule which is a rule of the company. The testimony shows it was a custom not to obey that rule. Now, that doesn't take it out of the category of being negligence, but if Mr. Owens knew the rule wasn't obeyed, it's then material on the question whether or not he was negligent, and if he had authority to see that the rule was enforced, [190] and didn't see that it was enforced, that testimony would go to show whether or not he had knowledge of the fact the rule was being disobeyed, and it is admitted for that purpose only.

Q. Did Mr. Owens follow the general practice and custom there of the switching crews in switching cars without having the bell rung?

(Testimony of D. B. Pidcock.)

A. Yes, I believe so.

Mr. Hanley: I make the same objection, and move to strike the answer on the same ground.

Judge Schwellenbach: Same ruling.

Q. Now, Mr. Pidcock, you remember the occasion of the injuries or accident sustained by Mr. Owens?

A. Yes sir.

Q. Where were you at the time?

A. I was in my office in the old yard.

Q. What was the first knowledge you had of the accident?

A. By Mr. Koefod coming within a short distance of the office and notifying me that Mr. Owens was injured, and I came out to the front step.

Q. What did you do?

A. I immediately ran to Mr. Owens.

Q. You found him badly injured, did you?

A. Yes sir.

Q. Did he say anything to you as you came up to him?

A. Yes, he did.

Q. What did he say?

A. He just said 'Well, Jack, I didn't make it'.

[191]

Q. Is that all he said?

A. That's all.

Q. You assisted in tying up his wounds?

A. Yes.

Q. Tell what you did.

A. When I got to Mr. Owens, there had been a bell rope removed from the engine and made into

(Testimony of D. B. Pidcock.)

a tourniquet which I applied to his legs after I got there.

Q. About how long before the ambulance arrived?

A. Very shortly. I would say it was not more than ten or twelve minutes.

Q. Did you send Mr. Hinkle out to Division Street to intercept the ambulance?

A. Yes sir.

Mr. Hamblen: That's all.

#### Cross Examination

By Mr. Hanley:

Q. You didn't mean that Mr. Owens could get on the engine and tell the engineer he should put more water in his boiler, or the fireman he should fire the boiler with a greater volume of fuel, do you, when you testified he had complete control of the engine and switch crew?

A. I will have to go to quite length to clarify that. I don't believe I made the statement that Mr. Owens had complete control of the engine. I said complete charge of the engine crew.

Q. To the extent of the movement of that engine, isn't that true?

A. Yes, and if it became necessary to have the engineer [192] and fireman supply more steam in order to handle the business he certainly would have jurisdiction to tell them to get some more.

Q. Tell them how to operate the engine?

(Testimony of D. B. Pidcock.)

A. If necessary.

Q. As a matter of fact the operation of this engine was left up to the engineer in so far as the mechanical operation was concerned, isn't that true? A. That's right.

Q. And the fireman, likewise, it's left up to him to supply the necessary heat and fuel to operate the necessary steam to move the engine, isn't that right? A. That's correct.

Q. And it wouldn't be Owens' place, nor would any engine foreman have the right to get in that engine and tell them what to do or how to do it.

A. I will answer that in this way: if they didn't have steam enough to do the work the engine foreman certainly had jurisdiction to see that they did have the necessary steam——

Q. But he wouldn't have the right to get up and tell them how to do it.

A. No, not how.

Q. The operation of the engine is left to the fireman and engineer. A. That's right.

Q. The ringing of the bell was left to the engineer and fireman, isn't that right? That is part of the mechanical contrivance or operation of the engine, the [193] actual physical handling of that bell is by the fireman and engineer in the manipulation of that bell, isn't that right?

A. The manipulator of the bell, that's right.

Q. They are supposed to obey the rules of the company? A. Yes.

(Testimony of D. B. Pidcock.)

Q. They are all bound by them?

A. Yes sir.

Q. And no one has any right, working for the company, including the yard employees, to waive or change any of those rules, is that right?

Mr. Hamblen: That is objected to as not proper cross examination.

Judge Schwellenbach: Objection sustained.

Q. Now, you give the directions to Mr. Owens where to switch, is that right? A. Yes.

Q. Were the instructions given to Mr. Owens to get these particular two cars given orally, or in writing?

A. Yes, I think they were.

Q. Didn't he have a switch list at all?

A. He had a switch list of the entire yard in which this track these two particular cars were on were amongst that list. This list is given each engine foreman as he starts on his duties. I instructed Mr. Owens to get these two particular cars at that particular industry, and then he checked them with the switch list.

Q. In getting these cars what was he doing with them? Wasn't he making up a train on track 13?

A. He was making a transfer. [194]

Q. For what road? A. Various roads.

Q. Would it be hauled out of the yard?

A. Yes.

Q. When would it go out?

A. As soon as it could be made up.

(Testimony of D. B. Pidcock.)

Q. In other words, you had to have it out right away, is that correct?

A. There was no definite time.

Q. Would his crew haul that transfer out of the yard?

A. Yes sir.

Q. Were these two cars of the cars to be picked up on the Pendleton track, weren't they the last three cars of that transfer?

A. In that particular part of the transfer, yes.

Q. Then when those three cars were obtained and coupled onto the cars on track 13, then this switch engine with this crew would take the transfer on over to the point of delivery?

A. Yes sir.

Q. Do you know the condition of the cars down on 13, did you see them that were being made up—were they coupled up or not?

A. As I recall it the main portion of the cars were coupled up with the exception of these two, and the one they were to get from the Pendleton track.

Q. Would the switch list indicate the moves to be made in connection with that switching operation?

A. No. [195]

Q. That would be left up to the train crew?

A. That's up to the engine foreman.

Q. Mr. Owens, when you saw him he was conscious?

A. Yes sir.

Q. He was there until how long after the time he was injured until the ambulance arrived?

A. I wouldn't say it would be in excess of fifteen minutes.

(Testimony of D. B. Pidcock.)

Q. You called the ambulance?

A. My clerk called the ambulance. I told him to call the Emergency.

Q. You assisted in rendering first aid?

A. Yes sir.

Q. Did he seem to be suffering at the time?

A. I asked him if he was and he said no, he had no pain.

Q. He was conscious, though?                      A. Oh, yes.

#### Redirect Examination

By Mr. Hamblen:

Q. About how many switching movements would this crew make in the course of that day's movements, if you can say?

A. It would just be a guess if I did that.

Q. Would it be five, ten or twenty, or fifty or a hundred, just approximately, couldn't you say?

A. Well, it would be a hazard, that would be all—I would say 150. [196]

#### Recross Examination

By Mr. Hanley:

Q. That's just a guess.

A. That's absolutely a guess.

Q. Now, just one more question. The other engine in the yard was not working at the time.

A. It was standing still.

Q. How long had it been standing still?

A. It just came into the yard prior to Mr. Owens pulling those cars from the main line.

(Testimony of D. B. Pidcock.)

Q. That engine was about the only engine that works up in the yard, the one Mr. Owens was on?

A. Yes.

Q. And the only one working at that time.

A. Yes.

Witness excused.

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A. RUTHERGLEN,

was called and sworn, and testified as follows:

Direct Examination

By Mr. Hamblen:

Q. Your name is A. Rutherglen?

A. Yes sir.

Q. Where do you live?

A. In Portland, Oregon.

Q. What position do you occupy with the Union Pacific Railway Company?

A. Safety agent in the Northwest District.

Q. What do your duties cover?

A. All the territory west of Huntington, Oregon, [197] including Huntington, and west of Huntington.

Q. That includes Spokane? A. Yes sir.

Q. Just what are your duties?

A. General supervision of the observance of rules, safety working conditions, safe working practices.

Q. Just tell the jury what contact you have with



(Testimony of A. Rutherglen.)

the men employed by the company in connection with safety rules.

Q. By frequent checks and inspection of the work and conversations with the men and safety meetings.

Q. What are those safety meetings?

A. Those are meetings we have at various points. The employees attend and we discuss matters and invite suggestions of improving the conditions so far as safety is concerned.

Q. Does your work make you familiar with the operating in switch yards?

A. To the extent so far as the rules are concerned.

Q. Are you familiar with the switching of cars in the Spokane yard with reference to the ringing of the bell on the engines in making switches?

A. Yes.

Q. What is the general custom in that regard?

Mr. Hanley: That is objected to on the ground it is incompetent, irrelevant and immaterial. Attempts to construe a rule that is in evidence undisputed.

Judge Schwellenbach: I will admit it under the same ruling.

Q. On what is termed battlefield or lead switching [19<sup>c</sup>] where no crossings are involved it is not the practice to sound the bell for momentary stops moving backward and forward.

(Testimony of A. Rutherglen.)

Q. And that applies to the Spokane yard?

A. Yes sir.

Mr. Hamblen: You may inquire.

Cross Examination

By Mr. Hanley:

Q. Right after this accident happened did you recommend that the bel be rung under circumstances like this one? Did anybody recommend at your meetings that the bell be rung?

A. Not to my knowledge.

Q. Now, don't you recommend when there is a fatal accident——

Mr. Hamblen: That is objected to as not proper cross examination.

Judge Schwellenbach: I will sustain the objection. I want to instruct the jury that the testimony of Mr. Rutherglen in the beginning about the meetings with employees on safety matters was admitted solely for the purpose of showing Mr. Rutherglen's qualifications to testify, and not for the purpose of showing any safety policy upon the part of the defendant company.

Q. You have never spent much time in the yards?

A. Yes, quite a lot of time.

Q. You were never a switchman? A. No.

Q. Never an engine foreman? A. No.

[199]

Q. Were you ever in train service as conductor?

A. As a brakeman.

(Testimony of A. Rutherglen.)

Q. How long?

A. For some two and a half years.

Q. How long ago was that?

A. Between 1912 and 1915.

Q. You never worked in Spokane or out of Spokane?

A. No.

Q. Where was that?

A. Wyoming on the Northern Pacific.

Witness excused.

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C. N. RICHARDS,

recalled, testified as follows:

Direct Examination

By Mr. Hamblen:

Q. You are the same Mr. Richards who testified yesterday and this morning?

A. Yes.

Q. You are the engineer who was on this crew of which Mr. Owens was foreman?

A. Yes sir.

Q. How long have you operated in the Spokane yard as engineer?

A. Since 1916.

Q. You are familiar with the custom and practice with reference to the ringing of the bell in the battlefield operations?

A. Yes sir. [200]

Q. What is that custom?

A. Just over road crossings where you find section men, or workmen, to draw their attention—

(Testimony of C. N. Richards.)

Mr. Hanley: I move to strike the answer. An attempt to interpret the rule admitted in evidence here.

Judge Schwellenbach: Same ruling and same instructions to the jury.

Q. Your answer is it is not the practice except to call attention to the section men?

A. Yes, or over road crossings or street crossings.

Q. Had you conducted these battlefield operations with Mr. Owens on numerous occasions?

A. Yes, sir, many occasions.

Q. State whether or not that practice you just referred to was followed during those times while he was foreman?

A. They were followed.

Mr. Hamblen: You may inquire.

### Cross Examination

By Mr. Hanley:

Q. You would ring it for the section men in the yards, you said. Did you ring the bell always for the section men?

A. If they were working on the track I would ring it.

Q. Did you ring it for any one else on the track you could see?

A. When the engine was moving if any one was on the track—

Q. You bet you always rang it—that was the practice there, wasn't it?

A. Yes sir. [201]

(Testimony of C. N. Richards.)

A. *Yes sir.*

Mr. Hanley: That's all.

Q. (By Mr. Hamblen) In other words, for anybody other than the members of the crew who were handling the operations, is that correct?

A. *Yes sir.*

Witness Excused

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F. H. LANG,

was called and sworn, and testified as follows:

Direct Examination

By Mr. Hamblen:

Q. Your name is F. H. Lang? A. *Yes sir.*

Q. Where do you live? A. *Valleyford.*

Q. You are employed by the Union Pacific Railway Company? A. *Yes sir.*

Q. What is your employment?

A. *Engine foreman.*

Q. How long have you been employed as an engine foreman by the Union Pacific Railway Company?

A. *Extra since about eighteen years ago, regular about ten or twelve years ago.*

Q. During all of that time except vacations you have been working as engine foreman?

A. *Yes sir.*

Q. What did you do prior to that time? [202]

A. *Helper.*

(Testimony of F. H. Lang.)

Q. Just what is a helper?

A. The helper takes instructions from the foreman, assists with the work.

Q. How many helpers does an ordinary crew have?      A. Two.

Q. Just what are their duties?

A. They throw the switches or pull the pins or give signals whatever the occasion may be.

Q. When did you work as engine foreman, in what year?

A. I started to work in the new yard and wound up at the old yard on Division Street.

Q. How long have you worked in the old yard?

A. Altogether going on 22 years.

Q. During that time did you work in connection with Mr. Owens on the same crew with Mr. Owens?

A. I helped Mr. Owens years ago.

Q. Have you observed him working there in the yard during recent years up to the time of his death?

A. Well, I haven't seen him in the last few years. I haven't paid any attention to him since I worked for him.

Q. What has been the custom during the time you have worked there with reference to the ringing of the bell of the engine in making switching movements?

Mr. Hanley: I make the same objection.

Judge Schwellenbach: Same ruling and same instruction to the jury.

(Testimony of F. H. Lang.)

A. The bell isn't rung on short switching, if it was [203] it would be ringing continuously.

Mr. Hanley: I object and move to strike the last part of the answer.

Judge Schwellenbach: Objection sustained, and the jury is instructed to disregard it.

Q. Has that been the custom during all the time you were working there? A. Yes.

Q. And during that time Mr. Owens has been working there for many years as engine foreman.

A. Yes sir.

Q. Mr. Owens worked there during that time for many years. A. Oh, yes.

### Cross Examination

By Mr. Hanley:

Q. You didn't pay any particular attention to Mr. Owens since you quit working for him, did you?

A. Yes. In order to see him I would have to come down when I wasn't on duty.

Q. You didn't work in the old yard for how many years?

A. I worked in the old yard every day.

Q. With your own engine? A. Yes.

Q. You didn't work for Mr. Owens for how many years? A. About ten years.

Q. You mean ten years before he died?

A. Yes.

Q. Consequently you didn't pay any particular

(Testimony of F. H. Lang.)

attention to what was transpiring in his particular crew—that's [204] true, isn't it?      A. Yes.

Q. It's quite a job to take care of your own crew, isn't it?      A. Yes, it is.

Witness Excused

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Mr. Hamblen: I think we are about at the end of our witnesses. If your Honor is going to take a few minutes recess—if so we can check it.

Whereupon Court recessed for five minutes.

Mr. Hamblen: The defendant rests.

Mr. Hanley: No rebuttal.

Mr. Hamblen: At this time, all the evidence being in, the defendant moves for a directed verdict on the grounds presented in the motion for nonsuit and for dismissal.

Judge Schwellenbach: The Motion is denied. Let the record show that during recess the Court presented in detail to Counsel for both sides the instructions that he intends to give, and those instructions requested which he does not intend to give.

Whereupon the case proceeded to argument.

After argument of Counsel had closed, the Court instructed the Jury as follows: [205]

Judge Schwellenbach: Members of the Jury:

You have heard the evidence and the arguments of Counsel: it now becomes the duty of the Court



to instruct you as to the law involved in the case, and outline to you the issues involved in the case, and as it is the Court's duty to give you these instructions it is as well your duty to accept them as being the law of the case.

You will consider the instructions as a whole and not lay undue stress on any particular portion of them.

You are the exclusive judges of what is the evidence in the case, and of the weight and credit to be given to the testimony of each witness. In doing this you may take into consideration the conduct, appearance and demeanor of each witness while testifying, the intelligence or lack of intelligence displayed by the witness; the apparent candor and frankness or want of this quality, if any such appears, the reasonableness or unreasonableness of the story told by the witness; its probability or improbability measured by your own experiences in life; the relationship existing between the parties which, in your judgment, would cause the witness to warp or color or bias his testimony one way or the other, and the extent to which such might, in fact, influence his testimony; the interest or lack of interest on the part of the witness in the outcome of this case; in short, all the facts and circumstances disclosed from the witness stand, and in the light of all these circumstances give to the testimony of each witness that fair and reasonable weight which in your particular judgment as men of common sense it appears to you to be reasonably

and justly entitled to receive [206] at your hands, and no more. I further instruct you if a witness has wilfully testified falsely than you are at liberty to disregard his entire testimony except in so far as it may be corroborated by other evidence of a credible character. When in these instructions I use the word "burden", I mean the burden of proof. This being a civil action the party having such burden must prove his point by a fair preponderance of the evidence. The expression "fair preponderance of evidence" means the greater convincing force or weight of the evidence. It means that which appears to be the most reasonable and the more probable happening or event. It doesn't necessarily mean the greater number of witnesses testifying for or against a given proposition or claimed fact or series of facts, nor does it make any difference on which side the evidence is offered. It means taking all the evidence on that issue into consideration, no matter which side may have offered it, the convincing weight and force of the evidence is in favor of one side as against the other.

The defendant is not an insurer of the safety of its employees, nor is it an insurer against injuries sustained by an employee. The mere fact that an employee may be injured in the course of his employment does not, of itself, render the employer liable for loss or damage sustained thereby. The law establishes that the employer shall exercise reasonable care by itself and by its servants to prevent

accidents, and the law can hold the employer responsible only when it fails to exercise such care.

[207]

The employer is not responsible for an accident merely because it happens, but only when it has caused such an accident directly or indirectly by some negligent act or omission of a legal duty.

In arriving at your verdict in this case you will consider all the evidence submitted by the respective parties without any feeling of sympathy or prejudice for or against the plaintiff or defendant, and decide the case solely upon its merits without regard to the position occupied by either of the parties or the need of the party on the one hand, or the ability of the other party, on the other hand, to pay.

The issues in this case are made up of what is known as the "pleadings". You will take them with you to the jury room. They are not evidence and are not to be so considered by you. They are simply a summary of what each party expects to prove at the outset of the trial.

The plaintiff's pleading consists of a complaint. The defendant's pleading consists of an answer. The answer contains two affirmative defenses. In the answer the defendant denies certain allegations of the complaint. Those allegations in the complaint denied by the defendant the plaintiff has the burden of proving. The defendant has the burden of proving the allegations of its affirmative defenses.

Looking at the complaint first. It's entitled "Amended Complaint". In it the plaintiff alleges that she is the executrix of the estate of her de-

ceased husband. There is no contention about that. She alleges [208] that the defendant is a corporation and that more than \$3000 is involved, and there is no dispute about that. She alleges that in the times mentioned defendant was operating a railway line in Interstate Commerce. There is no dispute about that. She sets forth certain rules of the defendant company, and I will call particular attention to the rule 30 later. Then she alleges that on or about February 16, 1939, the defendant was employing her deceased husband, and that in the course of his employment he was injured, and that he suffered for a period two and a half hours prior to his death. There is no dispute here about the fact he was injured and lived for approximately that period of time, and that he died as a result of his injuries, received in the accident complained of in this case. Then in paragraph V plaintiff alleges five causes of negligence, five claims of negligence, on the part of the defendant. As has been indicated to you by both counsel, after considering the argument this morning I have decided to withdraw from your consideration so far as the question of negligence is concerned four of the claims which were asserted by the plaintiff in her complaint, and I leave for your consideration that which is called "D" in paragraph 5, which reads that the defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars, or when same were

about to move. Now, I submit the case to you so far as the question of defendant's negligence is concerned, upon the basis of sub-division D of paragraph V, so far [209] as the first cause of action is concerned, and you are not to consider the other four claims of negligence.

Then, in the second cause of action there is practically the same allegation. The first cause of action is brought for the pain and suffering, conscious pain and suffering which the plaintiff alleges Mr. Owens suffered between the time of the accident and the time of his death. In the second cause of action so far as the facts about the parties and about the accident and claim of negligence is concerned, the allegations are the same. In the second cause of action plaintiff is seeking to recover for her loss because of the death of her husband, and in this cause of action I also withdraw from your consideration four of the claims of negligence, and leave for your consideration the one claim in reference to the ringing of the bell on the engine.

It is admitted that at the time of this accident there was in force and effect a series of rules which had been adopted by the defendant corporation. It is admitted that rule 30 which was then in force and effect reads as follows: "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, stations, tunnels and snow sheds". I instruct you that when a corporation or a company, an employing company, adopts a rule governing the conduct

of its employees for the purpose of safety of operation, and that rule is specific in its language, that that rule then, so far as the question of negligence is concerned, becomes the law of the company, and the failure to obey that rule constitutes negligence. [210]

I further instruct you that this particular rule, the first portion of rule 30 is specific in its language "the engine bell must be rung when the engine is about to move" and that if you find under the evidence in this case that at the time of this accident that portion of rule 30 was violated, then you are entitled to find that the defendant through its employees is guilty of negligence. Whether or not that negligence would be sufficient to make the defendant liable in this case will depend upon whether or not that negligence was the proximate cause of the injuries and death of Mr. Owens, and I will later define for you "proximate cause".

There is upon the plaintiff the burden of proving, first, that there was negligence, and, second, that that negligence was the proximate cause of the injury and death of Mr. Owens. Should they fail to prove that then the case will be decided by you upon that point without consideration of the affirmative defenses which the defendant has set forth in its answer.

In the answer of the defendant there are certain denials, which you will take with you to the jury-room. The defendant denies that it is guilty of negligence, and denies if you should find it was guilty of



negligence, such negligence was the proximate cause of any injuries which Mr. Owens may have sustained and the death of Mr. Owens. That makes an issue upon which the burden is upon the plaintiff. The defendant sets forth two affirmative defenses, first, contributory negligence. That is, that Mr. Owens himself was guilty of negligence which [211] proximately contributed to his injury and death.

In this court, under the statute on which this case is brought, contributory negligence is not a complete defense. Under this statute in this court, contributory negligence is a matter of the minimizing of the amount of damages, and I will later instruct you definitely on that rule.

So as to the affirmative defenses set forth by the defendant the burden is upon the defendant to prove contributory negligence in accordance with the instruction I gave to you at the outset.

The second affirmative defense of the defendant set forth in its answer, is that of assumption of risk. That Mr. Owens as an employee assumed the risk. If you should decide that the defendant had sustained the burden of proof so far as the second affirmative defense is concerned, then that would be a defense to the action and you would be entitled to hold for the defendant, despite the fact you might find the defendant was guilty of negligence, and I will instruct you further in detail in reference to the defense of assumption of risk.

You are instructed that negligence is the failure to do something that a person of reasonable care and prudence would have done, or the doing of

some thing a person of reasonable care and prudence would not have done. It's the want of due care in the particular situation. Due care and negligence are relative terms. What in one situation might be due care, might be negligence in another, and the measure of duty is always reasonable care upon the [212], one hand upon the part of the employer for the safety of the employee, and on the other hand of the employee for his own safety, and that care should be apportioned always to the dangers reasonably to be apprehended from the employment in which the employee is engaged.

Negligence in itself is not actionable. It is only where negligence is what is known as the proximate cause of injury or damage that it becomes actionable. In order to establish actionable negligence it is necessary for the plaintiff to prove that there has been a failure by the defendant in the exercise of reasonable care to discharge some duty which it owed to the plaintiff's decedent under the circumstances in which he was placed, and reasonable care being that care which a prudent man would exercise under similar circumstances when surrounded by like conditions, and not only this but plaintiff must also show that such a failure of duty was the proximate cause of the result of injury and death complained of.

Proximate cause being that which produces the result in a continuous sequence, and one without which the result would not have happened or that which directly contributes to bring it about.



I further instruct you that negligence is not presumed from the mere fact that an accident happened, or that a party may have been injured. On the contrary, the law presumes that both Mr. Owens and the defendant and its employees exercised due care and the party who attempts to establish negligence on the part of either must establish [213] it by a preponderance of the evidence.

I further instruct you in considering the question of defendant's two affirmative defenses you may take into consideration all the facts and circumstances surrounding the work Mr. Owens was doing in conducting defendant's switching yard, including the fact that Mr. Owens was in charge of the switching operation and had experience therewith and was familiar with switching practice in the yard, and the fact that whether or not there was any reason or necessity for Mr. Owens passing back over the track to the north after having thrown the lead switch, the fact that it was daylight and clear weather and all other circumstances and conditions involved.

Now, to consider the question of contributory negligence. As I pointed out to you contributory negligence under this statute in this court is not an absolute defense. Mr. Owens' negligence, if you find he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that Mr. Owens did an act which an ordinarily prudent person would not have done, or failed to do an act which an ordinarily prudent person

would have done under all of the existing circumstances having in mind the probable danger, then I charge you that he would be in respect thereto guilty of negligence. But if Mr. Owens' acts, if any you find, were the proximate cause of his injury and death, and if you further find that the acts, if any, of the defendant and its employees limited to the one claim of negligence which I have submitted to you were not the proximate cause, then it would be your duty to find for the defendant. In this [214] connection if you believe from a preponderance of the evidence that Mr. Owens' injuries and resultant death was proximately caused by one or more of the negligent acts of the defendant set forth in the complaint, that is to be limited to the one act heretofore submitted to you, and contributed to by one or more of the negligent acts of Mr. Owens as pleaded in defendant's answer, then it will be your duty to compare the same.

In order to make it clear to you what is meant by the comparisons of negligence declared by the law to be the duty of the jury to make, let me first instruct you your first inquiry would be: "Was the defendant or its employees guilty of negligence which had causal connection with the accident?" And your second inquiry would be "was the plaintiff's decedent, Mr. Owen, guilty of negligence" Your third inquiry would be "In what degree did this causal negligence contribute to the accident and resultant death, injuries and death to plaintiff's decedent, Mr. Owen?" If Mr. Owens' negligence con-

tributed to the accident and his injuries and death, then plaintiff's damages will be reduced by the extent that Mr. Owens' negligence contributed to the accident and his injuries and death.

This instruction on contributory negligence applies both to the cause of action claimed by the plaintiff for pain and suffering of the decedent, and to her cause of action for the death of the decedent and the burden of proof is on the defendant to prove contributory negligence. [215]

Next we come to defendant's second affirmative defense which is that of assumption of risk, and on that I instruct you as follows:

An employee is presumed to know all ordinary, visible and open risks and in this connection you are instructed the negligence of the defendant, if it was negligence, was not one of such risks unless the acts constituting such negligence were of such usual and common occurrence that plaintiff's decedent would be presumed to have known thereof before his injury and resultant death.

You are further instructed in addition to such assumption of ordinary risk which the employee is held to assume, that is, those risks which are incidental to the employment which may be said to be the usual and ordinary risks of any one engaged in that particular work would find, the employee would be held to assume those extraordinary or unusual risks of which he has knowledge, which he knows and appreciates, and which are so obvious that he must be held to have known and appreciated. The

burden is on the defendant to prove the affirmative defense of assumption of risk.

Now, Members of the Jury, you will remember I have permitted a number of witnesses to testify as to what they claim to be the practice and custom in the yard where **Mr. Owens** worked. It is claimed he was familiar with that practice and custom not to ring the bell in switching operations in the Spokane yard. As I told you when I permitted the evidence to be introduced it was not [216] to be considered by you in passing on the question of whether or not the defendant was negligent. It was a rule, the violation of which, if it was violated, constitutes negligence. And if such negligence proximately caused injury and death it is such a negligence as would entitle the plaintiff to recover and I permitted that evidence to be submitted to you in order that you might take it into consideration in passing on the question of assumption of risk, the question I am now discussing. And I further instruct you that even if you find that rule 30 relating to the ringing of the bell was not complied with, if you find from a preponderance of the evidence it was the established custom and practice of the railroad and the railroad company employes not to ring it, or require the ringing of the engine bell engaged in switching operations within the confines of defendant's switching yards here in Spokane, and if you find that such custom and practice was known to **Mr. Owens**, then I instruct you you are entitled to take that fact into consideration in determining

whether or not Mr. Owens assumed the risk involved in switching trains without the ringing of the engine bell. That testimony was submitted to you for that purpose and that purpose alone.

While I have instructed you in regard to the measure of damages which plaintiff will be entitled to recover in this case, in giving such instruction you are not to construe the same as indicating in any way that the court believed you should or should not find for the plaintiff or against the defendant. If you should find for the plaintiff under the [217] instructions I have given to you in assessing damages you should be guided by the following instruction: first, as to the first cause of action, as to the pain and suffering prior to death: Plaintiff, in her first cause of action is seeking recovery for the use and benefit of herself as surviving widow of the deceased such sum of money as would compensate Mr. Owen for conscious pain and suffering he underwent by reason of the negligence of the defendant from the time of the injury until his death, and under this cause of action, if you find for the plaintiff, it will be your duty to assess and determine such sum of money as would fully, fairly and reasonably compensate Mr. Owens for any conscious pain and suffering undergone by him as a result of the injury occasioned by the negligence of the defendant, or any of its employees, and in arriving at that amount it will be your duty to take into consideration the injury sustained by him and the pain and suffering, if any, consciously undergone by him at the time

from the time he sustained such injury to the time of his death, and to award plaintiff such sum as would have fully, fairly and reasonably compensated him for such pain and suffering had he lived, making such deduction, if any, as you think should be made on account of Mr. Owens' own acts, if you believe from the evidence he was guilty of contributory negligence, but in no event exceeding the sum of \$10,000, on this cause of action.

Now, on the second cause of action, which was for the death itself, plaintiff in her second cause of action is seeking to recover damages sustained by her as widow [218] of the deceased as the result of his death. This cause of action is brought by the plaintiff for the use and benefit of herself as widow of the deceased, and if you reach the point where you have decided under the evidence that you should assess damages on account of his death the same shall be based solely upon the pecuniary loss sustained by his widow by reason of the decedent's death and in arriving at this element of damages you may take into account the age of the widow, and the period during which she might reasonably expect to benefit by the continuation of the life of the deceased, the health, age, ability to earn money and the habits of the deceased, and the likelihood or probability that the deceased would have in the future contributed to the support and maintenance of the widow or that she would have received pecuniary benefit from a continuation of the decedent's life, had he lived, and your verdict on this phase of the case should repre-



sent such sum under all of the evidence affecting the age, character, habits and disposition of the deceased, and the age of the surviving wife as will fairly, justly and reasonably compensate her in present cash, taking into account the earning value of money, and giving consideration to the fact that your verdict anticipates the payment of moneys which the deceased would have earned and contributed to the surviving widow over a period of time and deferred in its receipt, for the pecuniary loss resulting to the widow from the death of the deceased, making such deduction if any as you may think should be made on account of [219] Mr. Owens' own act, if you believe from the evidence he was guilty of contributory negligence, but in no event should your verdict exceed the sum of \$40,000 on this cause of action.

You are instructed that it has been stipulated according to the American Experience Tables of Mortality the average life expectancy of a man 53 years of age is 18.79 years.

(Here follows stock instruction as to form of verdict)

After the giving of the Court's instructions and before the Jury retired to consider of its verdict, the following exceptions were taken to the Instructions of the Court to the Jury:

Mr Hanley: Plaintiff excepts to the withdrawal of subdivisions (A), (B), (C) and (E) of the grounds of evidence set forth in plaintiff's first cause of action, and in plaintiff's second cause of

action, in her amended complaint for the reason and upon the ground there is substantial evidence to sustain the submission of such grounds of negligence to the jury.

Mr. Hamblen: I want to except to the instruction of the Court which was to the effect that the violation of rule 30 which is the only cause of action left in the complaint, was negligence on the part of the defendant.

Judge Schwellenbach: Exceptions allowed.

[Endorsed]: Filed Sept. 4, 1941. [220]

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[Title of District Court and Cause.]

**INSTRUCTIONS REQUESTED BY  
DEFENDANT**

**Instruction No. 1**

You are hereby instructed to return a verdict in this case for the defendant Union Pacific Railroad Company.

(If the above instruction is not given, then the following instructions are requested:)

**Instruction No. 2.**

The mere fact that an employee of the defendant company was injured while in the discharge of the duties of his employment does not give rise to any inference or presumption that the employer has been negligent or at fault in any manner. On the contrary the presumption is that the employer has



discharged its full duty to the employee, and this presumption can only be overcome by affirmative proof of negligence on the part of the employer.

#### Instruction No. 3.

The defendant Union Pacific Railroad Company is not an insurer of the safety of its employees nor is it an insurer against injuries, no matter how serious, sustained by an employee. The mere fact that an employee may be injured in the course of his employment does not of itself render the employer liable for loss or damage sustained thereby. Accidents cannot be eliminated by law. All that the law has done is to establish that the employer shall exercise reasonable care by itself and its servants to prevent accidents, and the law can hold the employer responsible only when it fails to exercise such care. The employer is not responsible for an accident merely because it happens, but only when it has caused such accident directly or indirectly by some negligent act or omission of a legal duty.

#### Instruction No. 4.

Our system of procedure requires that in an action of this character the plaintiff must state in her complaint the particular grounds of negligence charged against the defendant. At the trial of the case the plaintiff must rely upon the grounds [223] of negligence so charged and on no others. No recovery can be had on any ground of negligence not so alleged which may have been suggested to you

during the trial of this case, or that may occur to you in your deliberations. If, upon consideration of the evidence, you find that the plaintiff has not established any of the specific charges of negligence set forth in her complaint, that will end your deliberations and you shall return a verdict for the defendant.

**Instruction No. 5.**

In order for the plaintiff to establish a case of liability against the defendant Railroad Company she must establish every element of her cause of action by a preponderance of the evidence. Among the necessary elements to establish liability plaintiff must show that the injuries sustained by the decedent Lyle F. Owens and the damages claimed by her were caused by the negligence alleged in her complaint. To establish these elements of liability it is not sufficient that plaintiff show merely that the injuries sustained to her decedent might possibly have resulted from the negligence of the defendant. In order for plaintiff to recover damages for any injuries sustained by her decedent she must show to your satisfaction by a preponderance of the evidence that the injuries sustained by him, if any, did in fact result directly and proximately from the alleged negligence of the defendant.

**Instruction No. 6.**

In her complaint the plaintiff charges that the defendant company was negligent in the following respect:

(a) "That defendant and defendant's employes carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars, which said lookout was the custom and practice known to and adopted by defendant."

In this connection I instruct you that on the record in this case no finding of negligence on the part of the Railroad Company can be based upon this allegation. [224]

Instruction No. 7.

In her complaint plaintiff alleges that the defendant was negligent in the following respect:

(b) "that defendant and defendant's employes carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent."

In this connection I instruct you that in conducting operations in a switching yard there is no duty upon the defendant railroad company to ring the engine bell, blow the whistle, or give any other warning signal to members of the switching crew, and that negligence cannot be based on this allegation.

Instruction No. 8.

In her complaint plaintiff alleges that the defendant was negligent as follows:

(c) "That defendant and defendant's yardmen carelessly and negligently failed and ne-

glected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars, the receipt of which said signal was the custom and practice known to and adopted by defendant."

In this connection I instruct you that the defendant cannot be held for negligence in connection with the said charge for the reason that there was no duty on the part of the defendant's yardmen or employees engaged in said switching movement to receive a hand or other signal from plaintiff's decedent before signaling its engineers to kick or move said cars, and that there was no custom or practice in connection with said switching operation as alleged therein.

**Instruction No. 9.**

In her complaint plaintiff alleges that the defendant was negligent as follows:

(d) "That defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the [225] engine, as provided by rule before moving said engine and cars or when same were about to move."

In this connection I instruct you that the defendant cannot be charged with negligence for there is no rule requiring the defendant and its enginemen to ring the bell of the engine before moving the train and cars in the switching movement which it was making at the time plaintiff's decedent sustained the injuries complained of.

**Instruction No. 10.**

In her complaint plaintiff alleges that the defendant was negligent as follows:

(e) "That defendant carelessly and negligently failed and neglected to provide plaintiff with a safe place to work."

In this connection I instruct you that there has been no testimony offered in support of this allegation, and defendant cannot be held negligent in that respect.

**Instruction No. 11.**

The defendant in this case has invoked the doctrine of assumption of risk by the plaintiff's decedent. In this connection I instruct you that assumption of risk is a proper defense in this case. The assumption of risk has been defined thus: the standard of care which the law requires of an employee is that which a reasonably cautious and intelligent person would exercise under the same circumstances; and the hazards and risks attendant upon his employment which he assumes are those which are open and obvious or which he ought to have known by using reasonable care, or those dangers which should be anticipated by the employee as a result of obvious conditions, or which may reasonably be expected to be known by him; and if the employee assumes the risk of the employment, he cannot recover even if he exercised the highest degree of care.

If therefore you find from the evidence that all of the conditions in connection with the switching

operation involved in this case were open and obvious to plaintiff's decedent and [226] that plaintiff's decedent as engine foreman was in charge of and familiar with said switching operations, then I instruct you that plaintiff's decedent assumed the risk of any injury sustained by him in connection with the work referred to, and your verdict should be for the defendant.

#### Instruction No. 12.

In arriving at your verdict it is your duty to follow the law as given to you by the court in these instructions, and to consider all evidence offered by the respective parties thereto without any feeling, sympathy or prejudice for or against either the plaintiff or the defendant, and to decide the case solely upon its merits. The fact that one of the parties is a corporation should not influence you in your deliberations, but the case should be considered and determined in the same way that it would be if both parties were individuals.

#### Instruction No. 13.

I instruct you that if you find from a preponderance of the evidence that the defendant was guilty of negligence in one or more of the respects alleged in plaintiff's complaint, and you further find that plaintiff's decedent was also guilty of negligence, and that said negligence of plaintiff's decedent was the sole and proximate cause of the injuries sustained by him, then I instruct you that plaintiff

cannot recover herein, and your verdict must be for the defendant.

**Instruction No. 14.**

The defendant is not required or expected to direct experienced railroad switchmen in the details of their employment, that is to say, an experienced railroad switchman when he enters the employment of the defendant tacitly represents that he knows the proper manner and method of performing the details of the employment and is presumed to know how to discharge such duties in the proper manner. This is particularly applicable to an engine foreman who is in charge of the switching crew, and if he fails to properly perform the duties naturally incident to his employment, then he assumes the risk as a matter of law, and cannot [227] assert that the defendant was negligent in failing to give him some warning or instruct him how to perform the duties incident to his employment, and cannot be heard to say that he did not appreciate the ordinary risks of the employment.

**Instruction No. 15.**

I instruct you that plaintiff's decedent was the engine foreman in charge of the switching crew employed in switching defendant's cars at the time he sustained the injuries alleged in plaintiff's complaint; that as such engine foreman, he was charged with the knowledge of the manner in which said switching crew performed their duties in connection with the switching movement of defendant's train.



If you find that the switching movement of defendant's train was made under the direction of plaintiff's decedent and in the usual manner in which such switching movements are made, and if you further find that plaintiff's decedent stepped in front of the moving train while same was being switched and as a result thereof was struck by said train and sustained the injuries alleged in plaintiff's complaint, then I instruct you that the plaintiff's decedent was guilty of negligence, and if you find that such negligence was the proximate cause of the injuries sustained by plaintiff's decedent, then I instruct you that plaintiff cannot recover in this case, and your verdict must be for the defendant.

**Instruction No. 16.**

While I have instructed you in regard to the measure of damages which plaintiff will be entitled to recover in this case, if you should find in favor of the plaintiff, in giving such instruction you are not to construe the same as indicating in any way that the court believes you should or should not find for the plaintiff or against the defendant. You are only to consider the question of damages to be allowed plaintiff after you have considered all of the evidence in the light of the instructions given and have determined that the defendant company acting through its [228] servants and employees was guilty of negligence as alleged in plaintiff's complaint, and that such negligence was the proximate cause of the injuries to plaintiff's decedent.



## Instruction No. 17.

The plaintiff has alleged that defendant railroad company was negligent in violating Rule No. 30 of defendant's rule book requiring that the bell of the engine be rung when the engine is about to move. I instruct you in this connection that if you find from a preponderance of the evidence that said rule did not apply to operations conducted within the confines of defendant's switching yard, then said rule should not be considered further by you in this case.

I further instruct you that, even though you may find that said Rule 30 relative to the ringing of the engine bell applied to operations within defendant's switching yard, nevertheless if you find from a preponderance of the evidence that it was the established custom and practice of said railroad and of said railroad company's employees not to ring or require the ringing of the engine bell engaged in switching operations within the confines of defendant's switching yards, and if you find that said custom and practice was known to plaintiff's decedent, Leyle F. Owens, then I instruct you that said Leyle F. Owens in his work in defendant's switching yard, assumed the risk involved in the movements of switching trains without the ringing of any engine bell, and the fact that said engine bell was not rung should then not be considered further by you in this case.

**Instruction No. 18.**

I instruct you that in considering the question of the negligence of plaintiff's decedent, Leyle F. Owens, you may take into consideration all facts and circumstances surrounding the work which said Leyle F. Owens was doing and conducting in defendant's switching yard, including the fact that said Owens was in charge of switching operations and was familiar with switching practices [229] in said yard, the fact of whether or not there was any reason or necessity for said Owens crossing back over the track to the north after having thrown the lead switch, the fact that it was daylight and clear weather and that the cars about to be switched were plainly visible, and all other circumstances and conditions involved.

I further charge you in this connection that the law does not permit an individual to say that he exercised reasonable care although he failed to see approaching cars, when the approaching cars were plainly visible to him.

**ROY F. SHIELDS  
HAMBLIN, GILBERT &  
BROOKE**

**Attorneys for Defendant**

**Copy Received**

**FRANK C. HANLEY  
Atty for Plf**

**[Endorsed]: Filed Apr. 22, 1941. A. A. LaFramboise, Clerk. [230]**

[Title of District Court and Cause]

**PLAINTIFF'S PROPOSED INSTRUCTIONS**

Instruction No. 1. Members of the jury, it now becomes the province of the court to give you instructions. You are instructed that negligence is the failure to do something that a person of reasonable care and prudence would have done, or the doing of something that a person of reasonable care and prudence would not have done under the circumstances. It is the want of due care in the particular situation. "Due care" and "Negligence" are relative terms, and what, in one situation, might be due care, might be negligence in another, and the measure of duty is always reasonable care and caution upon the part of an employer for the safety of his employees, and that care should be apportioned always to the dangers reasonably to be apprehended from the employment in which the employee is engaged.

Instruction No. 2. Negligence of itself is not actionable. It is only where negligence is what is known as the proximate cause of injury or damages that it becomes actionable. In order to establish actionable negligence, it is necessary for the plaintiff to prove to the jury, by the greater weight of evidence, or a preponderance of evidence, that there has been a failure by the defendant in the exercise of reasonable care to discharge some duty which it owed the plaintiff's decedent under the circumstances in which he was placed, and "reasonable care" being that care which a prudent man would

exercise under similar circumstances when surrounded by like conditions, and not only this, but plaintiff must also show that such a failure of duty was the proximate cause of the result of injury and death complained of. Proximate cause being that which produces the result in a continuous sequence and one without which the result would not have happened or that which directly contributes to bring it about. It is sometimes referred to as the procuring cause. It need not be the immediate cause, but it must be the cause which has a direct [231] and causative connection with the injury or death complained of.

Instruction No. 3. You are further instructed that in a case of this kind, negligence is not presumed from the mere fact that an accident happened, or that a party may have been injured. On the contrary, the law presumes that both plaintiff's decedent and defendant exercised due care, and the party who attempts to establish negligence on the part of either must establish it by a preponderance of the evidence.

Instruction No. 4. Under the law the defendant is liable in damages to the personal representative of an employe engaged in the discharge of the duties of his employment for conscious pain and suffering due to injuries and for his death, if caused in whole or in part from the negligence of the defendant, its officers, agents or servants. You are further instructed that under the law it was the duty of the defendant to exercise ordinary care to

furnish plaintiff's decedent with a reasonably safe place in which to work and that the failure to perform such duty on the part of defendant constitutes actionable negligence.

Instruction No. 5. You are therefore instructed that if you believe from a preponderance of the evidence that while plaintiff's decedent was employed by the defendant as an engine foreman in its yard at Spokane, Washington, on or about February 16, 1939, and that at said time defendant had moved two cars with an engine attached thereto upon the lead track in its yards and had stopped said cars preparatory to being moved and switched upon another track, and that plaintiff's decedent in the performance of his duties walked across said track in front of said cars to throw a switch in order that said cars could be moved and switched on to the track leading from said switch, and that after throwing said switch plaintiff's decedent was walking back across said track and that in so doing he was exercising reasonable and ordinary [232] care for his own safety, and if you further find from a preponderance of the evidence that defendant was negligent in one or more of the particulars alleged in the amended complaint which have been heretofore referred to and that such negligence, if any you find, was the direct and proximate cause of plaintiff's decedent being struck by said cars which were then being moved and switched upon said track thereby causing him to fall under said cars and the same to pass over him, and if you fur-

ther find that plaintiff's decedent thereby sustained any of the injuries alleged in plaintiff's amended complaint and that such injuries resulted in conscious pain and suffering to him or caused his death, or resulted in both conscious pain and suffering and caused his death, then your verdict should be for the plaintiff, unless plaintiff's decedent assumed the risk as will be explained hereafter.

Instruction No. 6. You have no doubt observed from the testimony as well as from the statement of the issues and the pleadings that defendant alleges that plaintiff's decedent's own negligence caused the injuries which resulted in his death of which plaintiff complains. Now plaintiff's decedent's negligence, if you find he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that plaintiff's decedent did an act or a number of acts which an ordinarily prudent person would not have done, or if he failed to do an act or a number of acts which an ordinarily prudent person would have done under all of the existing circumstances having in mind the probable danger of receiving an injury, then I charge you that he would be in respect thereto guilty of negligence but if plaintiff's decedent's acts in the particulars alleged in defendant's answer, if any you find, were the [233] proximate cause of the injury and death of which plaintiff complains, and if your further find that the acts, if any, of the defendant its employes as alleged in the amended complaint hereinbefore referred to were not the

proximate cause of plaintiff's injuries and resultant death, then it would be your duty to find a verdict for the defendant, and in this connection if you believe from a preponderance of the evidence that plaintiff's decedent's injury and resultant death was proximately caused by one or more of the negligent acts of the defendant as set forth in plaintiff's amended complaint and contributed to by one or more of the negligent acts of plaintiff's decedent as alleged in defendant's answer, then it would be your duty to compare the same as follows: In order to make it clear to you what is meant by the comparisons of negligence declared by the law to be the duty of the jury to make, let me instruct you that your first inquiry should be: "was the defendant guilty of negligence?". Your second inquiry would be: "was plaintiff's decedent guilty of negligence?". Your third inquiry should be: "in what degree did these casual negligences contribute to the accident and resultant injuries and death to plaintiff's decedent?". If plaintiff's decedent's negligence contributed or cause—we will say, the accident, resultant injuries and death to the extent of one-third of the entire negligence then plaintiff's damages would be reduced by one-third—if to the extent of two-thirds then her damages would be reduced by two-thirds—and if plaintiff's decedent's negligence was alone the sole cause of the accident, his injuries and death, then of course that would eliminate all damages and your verdict should be in favor of the defendant. This instruction on con-



tributory negligence applies to both the cause of action claimed by plaintiff for pain and suffering of the deceased and her cause of action for death of deceased. [234]

Instruction No. 7. I instruct you that the burden is upon the defendant to prove by a fair preponderance of the evidence its claim that plaintiff's decedent assumed the risk of his injuries and death.

Instruction No. 8. You are instructed that if you believe from a preponderance of the evidence that while plaintiff's decedent was employed by defendant as an engine foreman in its yards at Spokane and that at said time defendant had moved two cars with an engine attached thereto upon the lead track in its yards and had stopped said cars preparatory to being moved and switched upon another track, and that plaintiff's decedent in the performance of his duties walked across said track in front of said cars to throw a switch in order that said cars could be moved and switched on to the track leading from said switch, and that after throwing said switch plaintiff's decedent was walking back across said track and that in so doing he was exercising ordinary care, and if you further find from a preponderance of the evidence that defendant was negligent in one or more of the particulars mentioned in plaintiff's amended complaint heretofore referred to, and if you further find by the exercise of reasonable care plaintiff's decedent could not have known of such acts mentioned in plaintiff's amended complaint alleged to constitute



negligence, if any, on the part of defendant, then this disposes of the question of assumed risk and you should decide this question in favor of plaintiff as plaintiff's decedent assumed no risk of which he did not know or which by the exercise of reasonable care he could not have known. However, he is presumed to know all ordinary visible and open risks, and in this connection you are instructed that the negligence of the defendant, if any, was not one of such risks unless the acts constituting such negligence were of such usual and common occurrence that plaintiff's decedent would be presumed to have known thereof [235] before his injury and resultant death. You are further instructed that in addition to the assumption of ordinary risks which the employe is held to assume, that is those risks that are incidental to the employment which may be said to be the usual and ordinary risks anyone engaged in that particular work would find, the employe would be held to assume those extraordinary or unusual risks of which he has knowledge, which he knows and appreciates, and which are so obvious that he must be held to have known and appreciated.

Instruction No. 9. In the event under the instructions the Court has given you you find that plaintiff is entitled to recover damages, in assessing such damages you will then be guided by the following instruction:

(a) Plaintiff alleges a first cause of action seeking recovery for the use and benefit of herself as surviving widow of deceased such sum of money

as would have compensated the deceased for conscious pain and suffering, if any he underwent, by reason of the negligence of defendant from the time of the injury until the time of his death and under this cause of action if you find plaintiff is entitled to recover it would be your duty to assess and determine such sum of money as would fully, fairly and reasonably compensate the deceased for any conscious pain and suffering undergone by him as a result of injury occasioned by the negligence of defendant or any of its agents, servants and employes, and in arriving at that sum it will be your duty to take into account the injury sustained by him and the pain and suffering, if any, consciously undergone by him from the time he sustained such injury to the time of his death and to award plaintiff such sum as would have fully, fairly and reasonably compensated him for such pain and suffering had he lived, making such deduction, if any, as you may think should be [236] made on account of plaintiff's decedent's own acts if you believe from the evidence he was guilty of contributory negligence, but in no event exceeding the sum of \$10,000.00 on this cause of action.

(b) Plaintiff also alleges in her amended complaint a second cause of action seeking to recover damages sustained by her as widow of deceased as a result of his death. This cause of action is brought by plaintiff for the use and benefit of herself as widow of the deceased and if you reach a

point where you have decided under the evidence that you should assess damages on account of his death, the same should be based solely upon the pecuniary loss sustained by his widow by reason of decedent's death and in arriving at this element of damages you may take into account the age of the widow and the period during which she might reasonably expect to benefit by the continuation of the life of the deceased, the health, age, ability to earn money, and habits of the deceased, and the likelihood or probability that the deceased would have in the future contributed to the support and maintenance of the widow or that she would have derived pecuniary benefit from a continuation of decedent's life had he lived and your verdict on this phase of the case should represent such sum under all of the evidence affecting the age, character, habits and disposition of the deceased, and the age of the surviving wife, as will fairly, justly and reasonably compensate her in present cash taking into account the earning value of money and giving consideration to the fact that your verdict anticipates the payment of moneys which the deceased would have earned and contributed to the surviving widow over a period of time and deferred in its receipt, for the pecuniary loss resulting to the widow from the death of deceased, making such deduction, if any, as you may think should be made on account of plaintiff's decedent's own acts if you believe from the evidence he was guilty of contributory negli-

gence, [237] but in no event should your verdict exceed the sum of \$440,000.00 on this cause of action.

**FRANK C. HANLEY**

Attorney for Plaintiff

Service by copy received

**HAMBLÉN, GILBERT & BROOKE**

Attorneys for defendant

[Endorsed]: Filed Apr 22, 1941. A. A. LaFramboise, Clerk. [238]

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[Title of District Court and Cause.]

**VERDICT**

We, the jury in the above entitled cause, find for the Plaintiff, on the first cause of action in the sum of \$2000.00, and on the second cause of action in the sum of \$8,000.00.

**J. N. MILLIGAN,**

Foreman.

[Endorsed]: Filed Apr. 23, 1941. A. A. LaFramboise, Clerk. [239]

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[Title of District Court and Cause.]

**JUDGMENT ON VERDICT**

This cause having been duly tried before the Court and a Jury, Mr. Frank C. Hanley appearing for the Plaintiff, and Hamblén, Gilbert and Brooke appearing for the defendant, and the jury having on this date rendered the following verdict, to-wit:

"We, the Jury in the above entitled cause, find for the Plaintiff, on the first cause of action in the sum of \$2,000.00, and on the second cause of action in the sum of \$8,000.00.

J. N. MILLIGAN,

Foreman."

It is therefore ordered that the plaintiff have and recover judgment of and from the Defendant in the sum of Ten Thousand and no/100 (\$10,000.00) Dollars, together with interest thereon at the legal rate from this date until paid, together with Plaintiff's costs to be taxed.

Dated this 23rd day of April, A. D. 1941.

[Seal]

A. A. LaFRAMBOISE,

Clerk of the Above Entitled  
Court.

Approved:

FRANK C. HANLEY,

Attorney for the Plaintiff.

Approved as to form

HAMBLEN, GILBERT &  
BROOKE,

Attorney for the Defendant.

By L. R. HAMBLEN.

[Endorsed]: Filed Apr. 23, 1941. A. A. LaFramboise, Clerk. [240]

[Title of District Court and Cause.]

**MOTION TO SET ASIDE VERDICT AND  
JUDGMENT ENTERED THEREON AND  
TO ENTER JUDGMENT IN ACCORDANCE  
WITH DEFENDANT'S MOTION FOR DI-  
RECTED VERDICT.**

Comes now the above named defendant and moves the Court to set aside the verdict of the jury rendered herein and the judgment entered thereon in favor of the plaintiff and against the defendant, and to enter judgment for the defendant notwithstanding said verdict in accordance with its motion for a directed verdict.

This motion is based upon the records and files herein and upon the following grounds:

**I.**

That said verdict for the plaintiff is contrary to law.

**II.**

That said verdict for the plaintiff is contrary to the evidence and there is no evidence or reasonable inference from the evidence to justify the verdict.

**III.**

That said verdict is contrary to the law and the evidence.

**IV.**

That the court erred in refusing to direct a verdict for the defendant in accordance with defen-

dant's motion for a directed verdict made at the close of all of the evidence.

ROY F. SHIELDS,  
HANLEY, GILBERT &  
BROOKE,

Attorneys for Defendant.

Service of the within Motion is hereby admitted this 26th day of April, 1941.

FRANK C. HANLEY  
per EH

Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 28, 1941. A. A. LaFramboise, Clerk.[241]

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

In the event that the motion of defendant to set aside the verdict and the judgment entered thereon in favor of the plaintiff and to enter judgment, notwithstanding said verdict for the defendant in accordance with its motion for directed verdict, is denied, but not otherwise, defendant herein moves the court for an order granting it a new trial for the following causes and upon the following grounds materially affecting the substantial rights of the defendant:

#### I.

That there is no evidence or reasonable inference from the evidence to justify the verdict in favor of

the plaintiff, and that the verdict for plaintiff is contrary to law.

II.

Error in law occurring at the trial and excepted to at the time by the defendant in excluding evidence and proof offered by the defendant to the effect that Rule 30 of defendant's Book of Rules (Plaintiff's Exhibit "B") had no application to the matters or place involved in plaintiff's causes of action.

III.

Error in law occurring at the trial and excepted to at the time by the defendant in that the court instructed the jury as to the interpretation and application of Rule 30 of defendant's Book of Rules (Plaintiff's Exhibit "B") and that the violation of said Rule in itself constituted negligence on the part of defendant.

ROY F. SHIELDS,  
HAMBLIN, GILBERT &  
BROOKE,

Attorneys for Defendant.

Serve of the within Motion is hereby admitted this 26th day of April, 1941.

FRANK C. HANLEY,  
per EH

Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 28, 1941. A. A. LaFramboise, Clerk. [242]



[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR JUDGMENT**

Defendant's motion to set aside the verdict and judgment entered thereon in the above entitled cause, and to enter judgment in accordance with defendant's motion for directed verdict came on regularly for hearing before the Court, plaintiff appearing by her attorney, Frank C. Hanley, and defendant appearing by their attorneys, L. R. Hamblen and Herbert Hamblen, and after argument by respective counsel, the Court, upon consideration thereof, and being fully advised,

It is therefore ordered that said motion be and the same is hereby denied.

Dated this 13th day of June, 1941.

**L. B. SCHWELLENBACH,**

**Judge.**

Presented by

**FRANK C. HANLEY,**

**Attorney for Plaintiff.**

Approved as to form:

**ROY F. SHIELDS,**

**HAMBLÉN, GILBERT & BROOKE,**

**Of Attorneys for Defendant.**

[Endorsed]: Filed Jun. 13, 1941. A. A. LaFramboise, Clerk. [243]

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR NEW TRIAL**

Defendant's motion for new trial coming on for hearing before the Court, plaintiff appearing by her attorney, Frank C. Hanley, and defendant appearing by its attorneys, L. R. Hamblen and Herbert Hamblen, after argument by respective counsel, the Court upon consideration thereof, and being fully advised,

It is hereby ordered that said motion be and the same is hereby denied.

Dated this 13th day of June, 1941.

**L. B. SCHWELLENBACH,**  
Judge.

Presented by

**FRANK C. HANLEY,**  
Attorney *by* Plaintiff

Approved as to form:

**ROY F. SHIELDS,**  
**HAMBLEN, GILBERT &**  
**BROOKE,**

Of Attorneys for Defendant.

[Endorsed]: Filed Jun. 13, 1941. A. A. LaFramboise, Clerk. [244]

[Title of District Court and Cause.]

**NOTICE OF APPEAL**

Notice is hereby given that the Union Pacific Railroad Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action. Judgment on the verdict of the jury was entered in this action on April 23, 1941; an order denying defendant's motion to set aside the verdict and judgment entered thereon and to enter judgment in accordance with defendant's motion for a directed verdict was entered on June 13, 1941; and an order denying defendant's alternative motion for a new trial was entered on June 13, 1941.

**ROY F. SHIELDS,  
HAMBLEN, GILBERT &  
BROOKE,**

Attorneys for Appellant,  
Union Pacific Railroad  
Company, a corporation.  
Address: 915 Paulsen Building,  
Spokane, Washington.

[Endorsed]: Filed Sept. 4, 1941. [245]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

Come now the parties above named, plaintiff Bertha A. Owens, Executrix of the estate of Leyle F. Owens, deceased, by her attorney, Frank C. Hanley, and defendant Union Pacific Railroad Company, a corporation, by its attorneys, Roy F. Shields and Hamblen, Gilbert & Brooke, and hereby agree and stipulate that the following parts of the record, proceedings and evidence shall be and are designated to be included in the record on appeal, to-wit:

Plaintiff's amended complaint, with interlineated trial amendments;

Defendant's answer to amended complaint with interlineated trial amendments;

Reporter's transcript of all testimony, evidence and proceedings at the trial, including rulings of the Court on the admission and exclusion of testimony, defendant's motion for non-suit and dismissal at the close of plaintiff's evidence, with the Court's ruling thereon, and defendant's motion for a directed verdict at the close of all the evidence with the Court's ruling thereon, and the Court's instructions and defendant's objections to the Court's instructions;

Instructions requested by defendant;

Verdict of the jury;

Judgment on verdict;

Defendant's motion to set aside the verdict and judgment for plaintiff and to enter judgment in accordance with defendant's motion for a directed verdict. [246]

Defendant's alternative motion for a new trial;

Order denying defendant's motion to set aside verdict and judgment for plaintiff and to enter judgment for defendant;

Order denying defendant's alternative motion for a new trial;

Notice of appeal;

Stipulation designating matters to be included in the record;

Statement by appellant of the points on which it intends to rely on appeal.

Dated this 25th day of August, 1941.

**BERTHA A. OWENS,**

Executrix of the Estate of

Leyle F. Owens, deceased.

By **FRANK C. HANLEY,**

Her Attorney.

**UNION PACIFIC RAILROAD  
COMPANY,**

By **ROY F. SHIELDS,**

**HAMBLEN, GILBERT &**

**BROOKE,**

Its Attorneys.

[Endorsed]: Filed Sept. 4, 1941. [247]

[Title of District Court and Cause.]

STIPULATION AS TO ADDITIONAL RECORD

The parties hereto through their undersigned attorneys stipulate that the following additional parts of the record, proceedings and evidence shall be and are designated to be included in the record on appeal, to-wit:

Instructions requested by plaintiff

Plaintiff's exceptions to the Court withdrawing from consideration of the Jury Specifications (a), (b) and (c) of negligence as alleged in Paragraph V of the Amended Complaint as stenographically reported by the Court Reporter.

Dated this 11 day of September, 1941.

FRANK C. HANLEY,  
Attorney for Plaintiff-  
Appellee.

ROY F. SHIELDS,  
HAMBLIN, GILBERT &  
BROOKE,  
Attorneys for Defendant-  
Appellant. [248]

[Endorsed]: Filed Sep. 15, 1941. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

**STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL**

Comes now the appellant, Union Pacific Railroad Company, a corporation, by its attorneys, Roy F. Shields and Hamblen, Gilbert & Brooke, and makes the following statement of the points on which it intends to rely on the appeal:

**I.**

The trial Court erred in denying defendant's motion for non-suit and for dismissal at the close of plaintiff's evidence, and in denying defendant's motion for a directed verdict at the close of all the evidence, and in submitting the case to the jury, and in denying defendant's motion to set aside the verdict and judgment for plaintiff and enter judgment for defendant, for the following reasons and upon the following grounds:

(a) As a matter of law, there was no substantial proof of negligence on the part of defendant or defendant's employees. Negligence cannot be predicated on the alleged violation of company rule No. 30 relative to the ringing of the engine bell, so far as switchyard operations are concerned.

(b) There was no substantial proof that the injuries received by plaintiff's decedent were proximately caused by negligence of the defendant or defendant's employees. The jury could only conjecture and speculate as to the cause of the accident.

(c) From the evidence submitted, it was conclusive as [249] a matter of law that plaintiff's decedent assumed the risk of the injury which occurred.

## II.

The trial court erred in excluding evidence offered by defendant-appellant of the universal custom and practice in the interpretation of the bell ringing rule (Rule No. 30), as proof of the non-application, abrogation or abandonment of said rule within switching yards.

## III.

The Court erred in refusing to submit to the jury evidence of the universal custom and practice in the interpretation of the bell ringing rule on the issue whether said rule applied within switching yards.

## IV.

The Court erred in those instructions to the jury to the effect that there was a violation of the bell ringing rule, namely Rule No. 30, and that such violation in itself constituted negligence on the part of the defendant.

## V.

The Court erred in denying defendant-appellant's alternative motion for a new trial, based upon the matters set forth in Points II, III and IV above.



Dated this 30th day of August, 1941.

**UNION PACIFIC RAILROAD  
COMPANY,**

**A Corporation**

**Defendant-Appellant.**

**By ROY F. SHIELDS,**

**HAMBLEN, GILBERT &**

**BROOKE,**

**Its Attorneys.**

**[Endorsed]: Filed Sept. 4, 1941. [250]**

---

**[Title of District Court and Cause.]**

**APPLICATION AND ORDER FOR TRANS-  
MISSION OF ORIGINAL EXHIBITS TO  
THE CIRCUIT COURT OF APPEALS.**

Comes now the defendant above named and moves the court for an order providing for the safe keeping and transmission of the original exhibits listed below to the Circuit Court of Appeals, for the Ninth Circuit, on the ground that said exhibits cannot conveniently or satisfactorily be copied into the record and should be inspected by the appellate court.

This motion is based on the files herein.

The original exhibits referred to are Plaintiff's Exhibit A—"Map"; defendant's Exhibit 1—"Photo of Engine"; and defendant's Exhibit 2—"Photo of Track."

**ROY F. SHIELDS**

**HAMBLEN, GILBERT &**

**BROOKE**

**Attorneys for Defendant.**

### ORDER

This matter coming regularly on for hearing upon the motion of the defendant for an order to transmit certain Exhibits to the Circuit Court of Appeals, and it appearing to the court that said Exhibits cannot be conveniently or satisfactorily copied into the record and that the same should be inspected by the appellate court;

Now, therefore, it is ordered that the Clerk of this Court transmit the following original Exhibits to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, as and when he transmits the transcript of the record on appeal herein.

The original Exhibits referred to are:

Plaintiffs Exhibit A—"Map";

Defendant's Exhibit 1—"Photo of Engine";

Defendant's Exhibit 2—"Photo of Track".

Done this 29th day of September, 1941.

L. B. SCHWELLENBACH,

District Judge.

[Endorsed]: Filed Sept. 29, 1941.

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### CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States, for the Eastern District of Washington, do hereby certify the foregoing type-

written pages, numbered 1 to 252, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by the stipulations of counsel as the same remain on file and of record in the office of the Clerk of said District Court, except plaintiff's Exhibit "A" and defendant's Exhibits "1" and "2" which are originals, and that the same constitutes the record on appeal of the defendant Union Pacific Railroad Company from the final judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record amount to the sum of \$40.40 and that the same has been paid in full by Hamblen, Gilbert & Brooke, attorneys for defendant-appellant.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid District Court, this 29th day of September, 1941.

(Seal) A. A. LAFRAMBOISE

Clerk of the United States District Court, for the Eastern District of Washington.

[Endorsed]: No. 9940. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, Appellant, vs. Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, Deceased, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed October 4, 1941.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9940

UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

vs.

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, deceased,

Appellee.

STATEMENT OF POINTS AND  
DESIGNATION

Comes now the appellant above named and hereby formally adopts as its statement of points on which

it intends to rely in the appellate court the statement of points as filed in the trial court, said statement being included in the transcript as prepared by the Clerk of the trial court and forwarded to the Clerk of this court.

In support of the said points upon which appellant intends to rely, the appellant designates the entire record to be printed as necessary for the consideration thereof, except the following original exhibits, namely: plaintiffs Exhibit A and defendant's Exhibits 1 and 2, which said Exhibits have been transmitted to this court in their original form and as to which Exhibits appellant has made application to this court for relief from printing the same in the record.

**ROY F. SHIELDS  
HAMBLEN, GILBERT &  
BROOKE**

*Attorneys for Appellant.*

Service of the within Statement and Designation is hereby admitted by receipt of a true copy this 1st day of October, 1941.

**FRANK C. HANLEY**

*Attorney for Appellee.*

[Endorsed]: Filed Oct. 4, 1941. Paul P. O'Brien.  
Clerk.

[Title of Circuit Court of Appeals and Cause.]

**APPLICATION TO RELIEVE PARTIES FROM  
PRINTING CERTAIN EXHIBITS IN THE  
RECORD.**

Come now the parties above named, by their respective attorneys and stipulate and respectfully make application to the court for relief from printing and reproducing the following Exhibits in the printed record, to-wit:

Plaintiff's Exhibit A  
Defendant's Exhibit 1  
Defendant's Exhibit 2.

This application is made upon the ground that said Exhibits cannot readily or satisfactorily be printed or reproduced in the record, said plaintiff's Exhibit A being a large detailed map, and defendant's Exhibits 1 and 2 being photographic prints. The said original exhibits have been transmitted to this Court by the trial court, and the parties request that said exhibits be considered by this court in their original form without reproduction.

This application is based upon the affidavit attached hereto.

**UNION PACIFIC RAILROAD  
COMPANY**

By **ROY F. SHIELDS  
HAMBLEN, GILBERT &  
BROOKE**

Its Attorneys

**BERTHA A. OWENS**

Exec. Est Leyle F. Owens

Deed

By **FRANK C. HANLEY**  
Her Attorney

So ordered

**CURTIS D. WILBUR**

Senior United States Circuit Judge

State of Washington,  
County of Spokane—ss.

H. M. Hamblen, being first duly sworn on oath says that he is a member of the firm of Hamblen, Gilbert & Brooke of counsel for the appellant above named; that plaintiff's Exhibit A consists of a large map approximately 4 feet wide, showing in detail the track lay-out at the scene of the accident involved in this action; that said map cannot be satisfactorily reproduced or printed or reduced in size; that defendant's Exhibits 1 and 2 consist of photograph prints of the engine involved in the accident and of the section of the track involved in the accident; that said prints cannot be readily reproduced and that counsel for appellant do not have available the negatives at this time from which said original prints were made.

**H. M. HAMBLÉN**

Subscribed and sworn to before me this 30th day of September, 1941.

(Seal) **FRED W. GILBERT**

Notary Public in and for the State of Washington,  
residing at Spokane.

[Endorsed]: Oct. 6, 1941. Paul P. O'Brien,  
Clerk.

**No. 9940**

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**IN THE**

**United States Circuit Court of Appeals  
For the Ninth Circuit**

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**UNION PACIFIC RAILROAD COMPANY, a  
corporation,**

**Appellant,**

**vs.**

**BERTHA A. OWENS, Executrix of the Estate of  
Leyle F. Owens, Deceased,**

**Appellee.**

---

**Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Northern Division**

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**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, April  
22, 1942.

Before: Wilbur, Stephens and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Herbert  
M. Hamblen, counsel for appellant, and by Mr.  
Frank C. Hanley, counsel for appellee, and sub-  
mitted to the court for consideration and decision.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, Au-  
gust 5, 1942.

Before: Wilbur, Stephens and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION  
AND FILING AND RECORDING OF  
JUDGMENT

By direction of the Court, Ordered that the type-  
written opinion this day rendered by this Court

in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

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[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

### OPINION

Before: Wilbur, Stephens and Healy,  
Circuit Judges.

Stephens, Circuit Judge.

Appeal from a judgment after jury verdict in favor of the plaintiff-appellee for damages resulting from the death of her husband, an employee of the defendant-appellant Railroad Company, who was fatally injured during certain switching operations in which he was participating. The action was brought under the Federal Employers' Liability Act, 45 U.S.C.A. §§51-59.

Two causes of action were stated in the complaint, and each cause of action set out five separate grounds of alleged negligence on the part of the appellant, to whom we shall refer herein as the Railroad Company. At the close of all of the evidence the trial judge found that four of the alleged grounds of negligence and the proof sub-

mitted by the plaintiff in connection therewith were legally insufficient to submit to the jury. The case was submitted on the one remaining ground of negligence, namely, the alleged violation of Company Rule 30 which provided,

“Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds.”

and the defendant's defenses of the decedent's negligence and assumption of risk.

The evidence concerning the accident which resulted in the decedent's death is, briefly, as follows:

Decedent was employed by the appellant Railroad Company as engine foreman and was in charge of the switching operations to which we shall hereinafter refer. Working with the decedent and subject to his orders were two other switchmen, Koefod and Hinkle, and the engine crew composed of engineer Richards and fireman Seal.

This crew under the direction of the decedent was making up a train of freight cars in the old Spokane switchyard for transfer to various other roads. Operations were conducted over a series of tracks numbered from 1 to 13 and several other tracks designated locally by such names as the “old main line”, etc. These tracks were all joined by inter-connecting leads and switches. Generally the tracks ran in an easterly and westerly direction.

On the operation in question the engine had headed west on the old main line and had coupled onto two box cars. The engine then backed up easterly pulling the two cars. During this movement the decedent was riding on the stirrup, holding the grab irons on the north side at the west end of the car coupled to the engine, and his switchman Koefod was riding about three or four feet away from him on the north side of the next car. While riding in this position the decedent verbally instructed Koefod to "let these cars go 13". As the cars passed over lead switch No. 7, which served tracks 7, 8, 9, 10, 11, 12 and 13, the decedent dropped off and gave the engineer the stop sign. The cars stopped past the switch a distance variously estimated at seven to thirty feet. The decedent then walked around the west end of the rear car and crossed the track to No. 7 switch stand which was on the south side of the track. Koefod took up a position some twenty feet north of the cars where he could plainly see the switch points, although the view of the decedent and the switch stand on the south side of the track were obstructed by the cars.

There is no testimony to the effect that anyone saw the decedent throw the switch [since he was obstructed from the view of the witness Koefod as above stated] but Koefod saw the switch points change into line with No. 13 lead. He thereupon signalled the engineer [who was also on the north side] to kick the cars in toward No. 13 track.

The engineer in response to the signal gave the cars a kick or quick push and switchman Koefod pulled the pin uncoupling the cars from the engine permitting the cars to roll on down toward track 13, while the engine stopped and started back to get another car.

Koefod after pulling the pin stepped on the foot board of the engine and almost immediately his attention was called to a man nearby who was pointing back down the track. Koefod looked back and saw the decedent lying on the ground on the south side of the track near the switch over which the cars had just been kicked.

There was no testimony or evidence as to the reason for the decedent being on the track in front of the cars which were kicked. It had been the practice without exception for the man handling the switch on this type of an operation to stay at the switch until the movement had been completed. A witness to the accident, however, testified that the decedent started across the track from the south to the north and was caught by the cars. We quote from the record of this witness' testimony:

"\* \* he [decedent] was looking north—just for an instant he turned his head down to the yard and when he straightened his head up—why just before he straightened his head up I got scared and I says 'them cars are going to corner him'—they were coming about six miles an hour—I had no way of telling how fast they were going—I had a head end view of the

cars and before I could do a thing, or give him any warning, I was too far away—just as he turned around he seen the cars coming almost on top of him—he didn't have time to get out of the way—he throwed himself back and sideways, and as I recollect a draw bar hit him about in here—his right side—”.

There was no bell rung during or preceding the operation which we have just described, and it is urged by the plaintiff that this was in violation of Company Rule 30 which we have quoted above.

The evidence is undisputed that the decedent had been in the employ of the Railroad Company in this switchyard for some twenty-two years, and that for over twenty years it had been the custom of the Company's employees, including the decedent, not to ring any bell in ordinary switching movements. It also appears by the testimony that on the day of the accident some two hundred switching movements had already been made by the decedent's crew, in none of which the bell was rung except when the operation crossed one of the city streets.

In view of this uncontradicted testimony it is our opinion that the case of *Toledo, St. Louis & Western Railroad Company v. Allen*, 276 U. S. 165 compels a reversal of the cause.

In the cited case the injured employee was a car checker. The negligence complained of was in the company's failure to maintain an adequate space

between the tracks in the yard and the failure of other employees of the company to warn him of the approach of the cars. In holding that there could be no recovery, the Court said,

“And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. [Citing *Aerkfetz v. Humphreys*, 145 U.S. 418.]

“In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. \* \*”

So in the instant case we are of the opinion that it must be held as a matter of law that the decedent assumed the risk. There is nothing in the record to indicate that he was exposed to any un-

usual danger by reason of a departure from the practice generally followed. He himself had given the switching instruction and knew that the cars would be kicked at any moment. The existence of Company Rule 30, which plaintiff urges should be construed so as to require the ringing of the engine bell even in switching movements, is immaterial on the question of whether or not the decedent assumed the risk where as here the evidence is uncontradicted that the rule had not been so construed by employees including the decedent for more than twenty years prior to the accident.

In this view of the case we find it unnecessary to determine the proper construction to be given to Rule 30, whether or not a violation of such rule would constitute negligence per se, and other questions raised by the parties to this appeal.

Reversed.

[Endorsed]: Opinion. Filed Aug. 5, 1942. Paul P. O'Brien, Clerk.



United States Circuit Court of Appeals  
for the Ninth Circuit

No. 9940

UNION PACIFIC COMPANY, a corporation,  
Appellants,

vs.

BERTHA A. OWENS,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Northern Division and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee.

It Is Further Ordered and Adjudged by this Court that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Aug. 5, 1942.

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Monday, September 14, 1942.

Before: Wilbur, Stephens and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR  
REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellee, filed September 2, 1942, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

**ORDER STAYING ISSUANCE OF MANDATE**

Upon application of Mr. Frank C. Hanley, counsel for the appellee, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including October 31, 1942; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Dated: San Francisco, California, September 14, 1942.

**CURTIS D. WILBUR**

United States Circuit Judge

[Endorsed]: Filed Sep. 15, 1942.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred seventy-seven (277) pages, numbered from and including 1 to and including 277, to be a full, true and correct copy of the entire record (excluding Plaintiff's Exhibit "A") of the above-entitled case in the said Circuit Court of Appeals, made pursuant to the request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of October A. D. 1942.

[Seal]

PAUL P. O'BRIEN,  
Clerk

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 580

ORDER ALLOWING CERTIORARI—Filed January 18, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4716)

No 580

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# In the Supreme Court of the United States

OCTOBER TERM, 1942

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BERTHA A. OWENS, Executrix of the Estate  
of Leyle F. Owens, deceased,

*Petitioner,*

VS.

UNION PACIFIC RAILROAD COMPANY,  
a corporation,

*Respondent,*

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## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

✓ FRANK C. HANLEY,  
1508 Yeon Building,  
Portland, Oregon,  
Attorney for Petitioner.

ROY F. SHIELDS,  
Pittock Block,  
Portland, Oregon.

HARMBLEN, GILBERT & BROOKE,  
Paulsen Building,  
Spokane, Washington,  
Attorneys for Respondent.

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**In the Supreme Court  
of the United States**

OCTOBER TERM, 1942

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BERTHA A. OWENS, Executrix of the Estate  
of Leyle F. Owens, deceased,

*Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY,  
a corporation,

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI  
AND BRIEF IN SUPPORT THEREOF.**

---

To the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

**PETITION FOR WRIT OF CERTIORARI**

Your petitioner, Bertha A. Owens, Executrix of the  
Estate of Leyle F. Owens, deceased, respectfully shows  
to this Honorable Court:

## **SUMMARY STATEMENT OF THE MATTER INVOLVED**

This action was commenced by petitioner in the District Court of the United States for the Eastern District of Washington to recover damages for pain and suffering by and death of her husband, Lyle F. Owens, under the Federal Employers' Liability Act.

Decedent was employed by the Union Pacific Railroad Company as an engine foreman and on February 16, 1939, while engaged in participating in switching cars in the performance of his duties in defendant's yards at Spokane, Washington, two cars with the engine attached were kicked or pushed onto him by defendant's enginemen and other employees while their view of him was obstructed on account of the cars and curve in the track, without receiving any signal from him or giving him any warning, as he was crossing the track in front of the cars after throwing a switch, apparently proceeding to a point where he could give a signal that could be seen, for the movement of the engine and cars, as was the custom and practice (R. 108-114; 92, 93; 89-92; 95-99) and later to assist in picking up another car on the Pendleton track to the north and in the direction he was walking (R. 71) as instructed by his superior officer, the yardmaster (R. 181, 200-201). When the cars were pushed onto decedent as aforesaid, he was knocked down and run over by them inflicting mortal injuries from which he died about two and one-half hours later.

It is admitted by defendant that the following Rule 30 contained in its Book of Rules was in full force and effect :

"30. Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The evidence adduced by plaintiff, which will later be referred to, showed that the proximate cause of Mr. Owens' death was the negligence of the defendant. The following particulars were alleged in plaintiff's Complaint :

- "(a) That defendant and defendant's employees carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars ; which said lookout was the custom and practice known to and adopted by defendant ;
- (b) That defendant and defendant's employees carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent ;
- (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars ; the receipt of which said signal was the custom and practice known to and adopted by the defendant ;
- (d) that defendant and defendant's enginemmen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move."

Evidence of a number of witnesses ,principally defendant's employees responsible for the switching operation, was offered and received to establish that at the time the cars were being switched there was a practice and custom in the yards to look out for each other, including plaintiff's decedent, and ascertain his whereabouts before moving the cars, and that no one, including yardman Koefod who gave a kick signal to the engineer, ascertained where decedent was before giving such signal. Evidence was further received that it was a practice and custom to receive a hand or other signal from Mr. Owens, who was in charge of the crew, before signaling defendant's engineer to kick or move the cars (R. 108-114; 92-93; 89-92; 95-99) and that undisputedly no such signal was received from Mr. Owens at the time. There was further evidence, which was undisputed, that defendant's engineman who had complete control of the operation of the engine and the ringing of the bell (R. 199-200) that they failed to ring the bell of the engine before moving the engine and cars or when the same were about to move (R. 138) as provided by Rule 30 hereinbefore referred to.

Respondent in its pleadings admit that plaintiff's decedent was at the time of his death employed by the defendant as an engine foreman and that he was killed in the course of his employment for defendant and at the time of the accident causing his death was engaged in assisting in moving and switching cars with the engine attached (R. 3, 11) which contained

shipments of interstate commerce, then denied negligence and further alleged and offered some evidence which it claimed showed that Mr. Owen's death was caused by his own negligence in stepping in front of the moving cars and likewise that in stepping on the track in front of the cars which were about to be moved that he assumed the risk of being struck thereby.

This case was based upon and tried in the United States District Court for the Eastern District of Washington under the Federal Employers' Liability Act the parts of which apply to the instant case being as follows:

(a)

*Liability for Injuries to Employees*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves. or other equipment."

Section 51, Chapter 2, Title 45, U.S.C.A.



(b)

*Contributory Negligence*

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 53, Chapter 2, Title 45, U.S.C.A.

(c)

*Assumption of Risk*

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 54, Chapter 2, Title 45, U.S.C.A.

(d)

*Survival of Right of Action of Person Injured*

"Any right of action given by this chapter to a person suffering injury shall survive to his or



her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Section 59, Chapter 2, Title 45, U.S.C.A.

The jury returned a verdict in favor of petitioner for \$10,000.00 on the 23rd day of April, 1941, upon which judgment was entered in the trial court on the same date for such amount (R. 247-248).

Motion for judgment *non obstante verdicto* and motion for new trial were overruled by the District Court on the 13th day of June, 1941 (R. 252-253).

Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit which in a judgment dated August 5, 1942, reversed plaintiff's cause (See opinion of court R. 268; 129 Fed. (2d) 1013). Petition for rehearing was denied on September 14, 1942 (R. 276).

### **Jurisdiction of This Court**

The jurisdictional statute upon which your petitioner relies to invoke the jurisdiction of this Court is Title 28, Section 347 U.S.C.A. (Judicial Code Section 240) of the United States. Your petitioner claims that her rights under the Federal Statutes and especially the Federal Employers' Liability Act, parts of which are heretofore quoted have been denied by

the United States Circuit Court of Appeals for the Ninth Circuit, and that the same is in conflict therewith and with applicable decisions of this Court and decisions of Courts of Appeals of other Circuits as hereinafter more specifically stated.

### **REASONS RELIED ON FOR ALLOWANCE OF WRIT**

1. The Circuit Court of Appeals was in error in holding that petitioner's decedent as a matter of law had assumed the risks and dangers of his employment and in setting aside the verdict of the jury on this question in the face of the record which clearly showed by a preponderance of the evidence that the direct and immediate cause of the accident was the negligence of Mr. Owens' fellow servants which could not have been foreseen or expected by him, in failing to give decedent a warning by the engine bell when the engine and cars were about to move, as provided by Rule 30 of its Book of Rules hereinbefore referred to, thereby causing him when he was upon the track to be struck by the cars and mortally wounded. The decision of said Circuit Court was in direct conflict with decisions of the United States Supreme Court and decisions of other Federal Courts hereinafter referred to in brief in support of allowance of this writ.

2. That the decision of said Circuit Court of Appeals entirely ignored the evidence of petitioner that defendant's switchman Koefod failed to ascertain the

whereabouts of decedent or receive a signal from him before signaling defendant's engineman to kick the cars and the failure of defendant's enginemen to ring the engine bell as provided by Rule 30 of the Book of Rules, when the engine was about to move.

3. That said Court in its decision totally ignored the trial judge's construction of Rule 30 providing in part: "the engine bell must be rung when an engine is about to move" which was to the effect that it was a specific rule in its language adopted by the defendant governing the conduct of its employees for the purpose of safety of operation, and that it applied in yards, and the failure to obey the rule constituted negligence (R. 216, 217) which in this case was the negligence of defendant's enginemen as the duty rested with them to ring the bell (R. 199).

4. The said Circuit Court of Appeals erred in setting aside the verdict of the jury thereby refusing to allow the jury to pass upon the question of assumption of risk, and depriving petitioner of her constitutional right to trial by jury and to due process of law, and to equal protection of the laws under the 14th Amendment of the Constitution of the United States, in that the Court in its decision did not consider petitioner's evidence with reference to the practice of following the company rule and ringing the bell when the engine was about to move as given by yardman Hinkle, a co-worker of decedent, as follows: "Q. But in stopping and starting the cars you go by

the signals detailed in the Book of Rules, is that right?  
A. Yes, sir." (R. 114)

The undisputed evidence shows that Rule 30 is contained in the Book of Rules (R. 137-141) and it is admitted in the evidence and by the pleadings that all switching operations are done by and with the use of the switch engine (R. 3, 10), the mechanical operation of which is in the sole charge of the enginemen (R. 199).

Like testimony was given in the case of *Chesapeake & O. R. Co. vs. Proffitt*, 241 U.S. 462, 465; 60 L. Ed. 1102, 1105, and in such decision was considered sufficient to create a dispute in the testimony on the question there involved.

The Circuit Court of Appeal's opinion in this cause proceeds on the theory that the testimony stand uncontradicted that Rule 30 had not been construed by employees, including the decedent, for more than twenty years prior to the accident as requiring that the bell be rung in switching operations. The above testimony given by switchman Hinkle is in direct conflict with the testimony referred to in the Court's opinion.

See *Kanawha & Michigan Ry. Co. vs. Kerse, etc.*, 239 U.S. 576; 60 L. Ed. 449, 450, wherein this Court considered evidence much more remote than in the case at bar as disputing almost conclusive evidence that decedent brakeman assumed the risk as a matter of law and held that assumption of risk was a jury

question and affirmed judgment recovered for brakeman's death.

5. The Court erred in holding that it had been the custom of company employees, including decedent, for over twenty years not to ring any bell in ordinary switching movements. The evidence without dispute is conclusively to the effect that no duty devolved on decedent to ring the engine bell but that it was the exclusive duty of the enginemen (R. 199).

6. The Court erred in holding "The existence of Company rule 30 which plaintiff urges should be construed so as to require the ringing of the engine bell even in switching movements, is immaterial on the question of whether or not decedent assumed the risk, where as here the evidence is uncontradicted that the rule had not been so construed by employees, including the decedent, for more than twenty years prior to the accident".

In such holding the Court completely ignored the literal meaning of rule 30 reading: "Engine bell must be rung when an engine is *about to move*." Negligence charged by petitioner was failure to ring the bell of the engine as provided by the aforesaid rule, *before moving the engine and cars or where same were about to move*. The testimony of defendant's witnesses who testified on the subject tended to show the engine bell was not rung in ordinary *switching movements*. There is no testimony in the record that it was the custom or practice not to ring the bell when the engine was

*about to move or immediately preceding its movement.* The rule only required that the bell be rung when the engine *was about to move or immediately preceding its movement* and did not require the ringing of the bell during the actual switching movement itself.

7. The Court erred in holding that decedent gave the switching instruction and knew the cars would be kicked at any moment.

The sole testimony on this was that decedent said: "Let these cars go 13" (R. 71) and nothing more. Switchman Koefod, who gave the kick signal, only assumed this meant to kick the cars. No instruction was given to dispense with signals.

8. The Court erred in not giving effect to the rule of law as established by decisions of this Court that the burden of proving assumption of risk in cases arising under the Federal Employers' Liability Act is upon the defendant, and *whether the defense of assumption of risk is made out is a question for the jury.*

9. The Court erred in failing to note that at best the evidence was definitely conflicting, and in not permitting the jury to say in such a case under all of the evidence adduced herein whether the facts and circumstances proven established contributory negligence (which merely reduces the damages), or assumption of risk, for in some respects the two defenses blend, and in entirely ignoring the evidence of negligence contained in the record and that the danger complained of was created by the negligent act of decedent's co-

employees and was not open and obvious but arose suddenly and unexpectedly, and that decedent could have no knowledge thereof presumptive or otherwise nor did he have any time to appreciate the same.

10. The Court erred in presuming the decedent had knowledge that the switching operation would be performed without ringing the bell as provided by the rule, for the reason that under the evidence no knowledge thereof that such was the practice was brought home to the decedent, and further erred in holding, contrary to the decisions of this Court, that undisputed evidence on the question of assumption of risk became one of law for the Court and failed to apply the decisions of this Court which are to the effect that where the facts are such that reasonable minds would differ thereon, the question of assumption of risk is one for the jury.

11. The Court erred in not giving effect to the decisions of this Court that the Federal Employers' Liability Act is a remedial one, especially since the Congress has amended the law following the trend of previous decisions of this Court that the doctrine of assumption of risk has no application where the injuries or death of the employee results in whole or in part on account of the negligence of other employees of the carrier.

12. The Court erred in not giving effect to the established rule and decisions of this Court that an employee is not charged with the duty to exercise care



to discover extraordinary dangers that arise from the negligence of the employer or those for whose conduct the employer is responsible, but the employee may assume that the defendant, or its agents, have exercised proper care with respect to his safety until notified to the contrary; the Court further erred by its action in seizing upon pure technicalities to defeat the claim of this petitioner and thereby arbitrarily denied her the equal protection of the laws, and its decision if permitted to stand will deprive this petitioner as widow of deceased workman upon whom she was solely dependent for her support, of her claim under the Federal law and her rights will be forever lost.

### **PRAYER FOR WRIT**

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9940 Union Pacific Railroad Company, a corporation, Appellant, vs. Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, deceased, Appellee; and that said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court and the judgment



of the District Court of the United States for the Eastern District of Washington affirmed, or in the alternative that your petitioner be granted a new trial, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

**BERTHA A. OWENS, Executrix  
of the Estate of Leyle F. Owens,  
Deceased, *Petitioner.***

**By FRANK C. HANLEY,  
Attorney for Petitioner,  
1508 Yeon Building  
Portland, Oregon.**



## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

The Circuit Court of Appeals in its decision did not criticize in any particular the instructions or procedure followed by the District Court but reversed and dismissed the lower court's decision apparently on the broad ground that decedent had assumed the risk and no recovery could therefore be had. In so doing it is submitted that its judgment erroneously failed to consider and give effect to all of the evidence in the record and particularly that of defendant's witness Hinkle that all cars were started according to the signals detailed in the Book of Rules of which Rule 30 was one of them, or to give effect to the evidence that decedent's co-employees did not look out for him before giving a signal to kick the cars or did not obtain a signal from him before signaling the engineer to kick the cars as was the custom, which was clearly shown by the evidence, and further failed to give effect to the evidence that there was no bell rung by the enginemen when the engine was about to move as provided by Rule 30, and failed to give effect to the evidence that decedent was in charge of the switch crew and that the signals for starting and stopping the switching operations were given by him and not by his helpers.

The Court in its decision competely glossed over or paid no heed to the entire record of testimony or the fact that the evidence conclusively showed under the

decisions that defendant was guilty of negligence *per se*. The evidence clearly showed that the danger complained of was not open and obvious but was an extraordinary danger which arose suddenly and unexpectedly without knowledge or appreciation thereof by decedent which was created by the negligence of his fellow workmen. As stated, the Court ignored all of the evidence in the record by which the jury came to the conclusion under proper instructions, that the petitioner's decedent did not under the circumstances assume the risk. The Court furthermore ignored the settled proposition of law that the burden of proving the assumption of risk in cases arising under the Federal Employers' Liability Act is upon the defendant and whether *the defense of assumption of risk is made out is a question of fact for the jury*, and that the employee is not charged with the duty to exercise reasonable care to discover extraordinary dangers that may arise from the negligence of the employer or his co-employees for whose conduct the employer is responsible, but the employee may assume that the employer, or his agents, have exercised proper care with respect to his safety until notified to the contrary unless the want of care and danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate it.

In the instant case we have no obvious situation as the danger arose only from failure of the co-employees of decedent to observe the defendant's rules and arose suddenly without time or opportunity for

decident to avoid same and without notice to him that the cars were being kicked, as a result of which he met with his death.

By the decisions of this Court in such cases, a few of the principal ones being hereinafter cited, this was a matter to be passed upon by the jury *as it was passed upon*, and the Circuit Court erred in thus substituting its judgment and decision for that of the jury on the question of assumption of risk whereby the petitioner was denied her constitutional right of a trial by jury and to the due process of law, and denied the equal protection of the laws.

At this point we invite the Court's attention to the case of *U. R. I. & P. R. Co. vs. Ward*, 64 L. Ed. 430; 252 U. S. 18 which was an action under the Federal Employers' Liability Act wherein an error was claimed on account of the failure of the Court to direct a verdict on the ground that plaintiff assumed the risk. Ward was a switchman and was suddenly thrown from the top of a box car upon which he was about to apply a brake, on account of the negligent manner in which the foreman cut the cars loose from the engine which was pushing them, causing a sudden jerk thereof and precipitating Ward to the ground. In passing on the question of assumption of risk the Court stated:

"As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & O. R. Co. v. De Atley*, 241 U.S. 310, 315, 60 L. Ed. 1016, 1020, 36 Sup. Ct. Rep. 564: 'Accord-

ing to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U.S. 313. See also *Chesapeake & O. R. Co. v. Proffitt*, 241 U.S. 462, 468, 60 L. Ed. 1102, 1106, 36 Sup. Ct. Rep. 620; *Erie R. Co. v. Purucker*, 244 U.S. 320, 61 L. Ed. 1166, 37 Sup. Ct. Rep. 629.

"Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. *This situation did not make the doctrine of assumed risk a defense to an action for*

*damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk."*

The foregoing case is somewhat analogous to the facts in the case at bar on the question of assumption of risk in that decedent had neither warning nor opportunity to judge the danger to which he was exposed by failure of the enginemen to ring the bell or at least receive some notice that the cars were going to be summarily kicked, and in the absence thereof the decedent had a right to believe that the provisions of Rule 30 would be complied with as the evidence shows that due to lack of proper care on the part of the enginemen and co-workers while decedent was in the performance of his duty, he was suddenly struck by the cars. As held in the Ward case, *it is doubtful here if the situation made out the doctrine of assumed risk as a defense to the action.* The decision of the Circuit Court of Appeals is certainly in direct conflict with the ruling of this Court in the Ward case.

The Circuit Court of Appeals rests its decision entirely upon the case of Toledo St. L. & W. R. Co. vs. Allen, 275 U.S. 165; 72 L. Ed. 563. In such case the

plaintiff was a car checker and predicated negligence on a failure to maintain adequate space between the tracks in yards and the failure of a switch engine to ring a bell or blow a whistle to give warning of approach of a car, to plaintiff. The undisputed evidence showed that the space between the tracks was sufficient to enable plaintiff to keep out of the way of moving cars although the danger would have been less if the space were greater and that the cars which injured plaintiff were detached from the engine and that plaintiff was three or four hundred feet away from the lead track and that the engine was from 25 to 30 car lengths farther (altogether a distance of 1300 feet) and by reason of such distance the ringing of a bell or sounding of a whistle would have been of no use to plaintiff as a warning, citing *Aerkfetz vs. Humphreys*, 145 U.S. 418. The Court further held that spacing of tracks was an engineering question and should not be left to varying judgment of juries and for such reasons reversed judgment for plaintiff.

It will be noted that neither of these cases involved any safety rule adopted by the railroad for the ringing of a bell when the engine was about to move. There is a clear distinction in the facts of these cases and the case at bar. In the instant case Rule 30 exists which provides that *the bell shall be rung when the engine is about to move*. The engine according to the testimony was about 100 feet away (E. 55-56) from where decedent was at the switch and he was in a position where he could have heard the bell had it been



rung and it would have served as a warning to him.

The part of the Circuit Court of Appeal's opinion quoted from the Toledo case relative to assumption of risk is *obiter dictum* and was not necessary to Toledo case opinion, as a careful reading thereof indicates that the Court speaking through Justice Butler had decided before writing this portion of the opinion that there was no negligence in failure to space the tracks and that there was no negligence in the failure to ring the bell and obviously the ringing of the bell would not have been useful as a warning to plaintiff. In addition thereto the rule was applied to the case as announced in the decision of *Aerkfetz vs. Humphreys*, 145 U.S. 418 where no company rule was involved.

## SUMMARY

### I.

The decision of the Circuit Court of Appeals in reversing the verdict and judgment of the District Court is in direct conflict with the applicable decisions of Federal Courts in holding that petitioner's decedent as a matter of law had assumed the risk of stepping in front of the cars which were about to move and being struck thereby, in the face of the facts as shown by the record herein.

- Chicago R. I. & P. R. Co. vs. Ward, 252 U.S. 18;  
64 L. Ed. 430.
- Erie R. R. Co. vs. Purecker, 244 U.S. 320; 61  
L. Ed. 1166.
- Chesapeake & O. R. Co. vs. DeAtley, 241 U.S.  
310; 60 L. Ed. 1016.

- Chesapeake & O. R. Co. vs. Proffitt, 241 U.S. 462, 466; 60 L. Ed. 1102, 1105.  
N. Y. Central vs. Boulden (7th Cir.), 63 Fed. (2d) 917; Cer. denied, 289 U.S. 753; 77 L. Ed. 1491.  
Rocco vs. Lehigh Valley R. Co., 288 U.S. 275; 77 L. Ed. 743.  
Great Northern R. Co. vs. Leonidas, 305 U.S. 1; 83 L. Ed. 3 (affirming 72 Pac. (2d) 1007 (Mont.)).  
Gildner vs. Baltimore & O. R. Co. (2d Cir.), 90 Fed. (2d) 635.  
Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.  
Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

## II.

The Circuit Court of Appeals erred in that it did not give any consideration to the undisputed evidence that the enginemen failed to ring the engine bell, as provided by Rule 30, when the engine was about to move or immediately preceding the switching movement, and completely ignored the established law, as held by the following decisions, that a railroad company rule furnishes competent evidence against itself of a proper standard of care and its violation constitutes actionable negligence.

- Gildner vs. Baltimore & O. R. Co. (2d Cir.) 90 Fed. (2d) 635.  
Wyatt vs. N. Y. O. & W. R. Co. (2d Cir.), 45 Fed. (2d) 705. Cer. denied, 283 U.S. 829; 75 L. Ed. 1442.  
Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.  
Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.  
Lehigh Valley R. Co. vs. Mangan, 278 Fed. 85.

Atchison T. & S. F. Ry. Co. vs. Ballard (5th Cir.), 108 Fed. (2d) 768. Cer. denied, 310 U.S. 646; 84 L. Ed. 1413.

Chicago R. I. & P. Ry. Co. vs. Ship, 174 Fed. 353.

Gr. No. Ry. Co. vs. Hooker, 170 Fed. 154.

Central R. Co. of N. J. vs. Young, 200 Fed. 359.

### III.

The Circuit Court of Appeals erred in its decision in disregarding the rule of law contained in the following Federal decisions to the effect that testimony on assumption of risk in order to make it a jury question is not required to be in dispute but if the testimony is such upon which reasonable minds would differ it then becomes a jury question.

Chesapeake & O. R. Co. vs. DeAtley, 241 U.S. 310, 315; 66 L. Ed. 1016, 1020.

Erie R. Co. vs. Purucker, 244 U.S. 320; 61 L. Ed. 1166.

Chicago R. I. & P. R. Co. vs. Ward, 252 U.S. 18; 64 L. Ed. 430.

N. Y. Central vs. Boulden (7th Cir.), 63 Fed. (2d) 917; Cer. denied, 289 U.S. 753; 77 L. Ed. 1491.

### IV.

The Circuit Court of Appeals erred in holding decedent assumed the risk as a matter of law for the reason that under the facts in this case it was shown that the danger arose suddenly and unexpectedly from the negligence of decedent's co-employees in failure to receive or give proper signals and he had no opportunity to know and appreciate it. Where such conditions exist the doctrine of assumption of risk is not a defense.

Chicago R. I. & P. R. Co. vs. Ward, 252 U.S. 18; 64 L. Ed. 430.

Gildner vs. Baltimore & O. R. Co. (2d Cir.), 90 Fed. (2d) 635.

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.

Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

## V.

The decision of the Circuit Court of Appeals is in direct conflict with the following Federal decisions of other circuits where the violation of the same, or a similar rule to Rule 30, was claimed as negligence and they hold without exception if the engine bell was not rung there could be no assumption of risk.

Gildner vs. Baltimore & O. R. Co. (2d Cir.), 90 Fed. (2d) 635.

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.

Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

Lehigh Valley R. Co. vs. Mangan (2d Cir.), 278 Fed. 91.

## VI.

The Circuit Court of Appeals did not give effect to the rule of law as established by the decisions of this Court that the burden of proving the assumption of risk in cases arising under the Federal Employers' Liability Act is upon the defendant and whether the defense of assumption of risk is made out is a question for the jury.

Great No. Ry. Co. vs. Knapp, 240 U.S. 464; 60 L. Ed. 745.

Reed vs. Dir. Gen. of R. R., 258 U.S. 92; 66 L. Ed. 480.

Wright vs. Yazoo & M. V. R. Co., 197 Fed. 94; 207 Fed. 281.

Texas & N. O. R. Co. vs. Gericke, 231 S.W. 745.

## VII.

The Circuit Court of Appeals in setting aside the verdict of the jury and reversing judgment when no reversible error existed, thereby refused to allow the jury to pass upon the question of assumption of risk as it should do under the law, and deprived petitioner of her constitutional right to trial by jury and to equal protection of the laws under the 14th Amendment.

*St. L. & S. F. R. R. Co. vs. Brown*, 241 U.S. 223;  
60 L. Ed. 966.

*Bower vs. C. & N. W.*, 96 Neb. 419; 148 N.W. 145;  
241 U.S. 470; 60 L. Ed. 1107.

## VIII.

The Circuit Court of Appeals was in error in not giving effect to the decisions of this Court that the Federal Employers' Liability Act is a remedial one and like all remedial legislation should have a liberal construction to advance the remedy proposed by the Congress and to correct the evils against which it was directed. "It is designed to enlarge, not to restrict, the rights of injured workmen."

*Baltimore R. R. Co. vs. Branson*, 128 Md. 678;  
98 A. 225.

*Johnson vs. So. Pac. Co.*, 198 U.S. 1; 49 L. Ed.  
363.

*Spokane & Inland Empire R. R. Co. vs. Campbell*, 241 U.S. 497; 60 L. Ed. 1125.

## IX.

The Circuit Court of Appeals in its decision acted in an arbitrary manner in view of its judgment of reversal, in not granting petitioner a new trial in the Court below in that it failed to give effect to the testimony contained in the record of H. H. Chapman (R. 89-92, 95-99) and E. B. Hinkle (R. 108-114), members of the crew, that it was the custom and practice when

**a foreman situated as Mr. Owens was, the view of him being obstructed, to receive a signal from him before kicking the cars:**

- (a) failure to receive a signal to start a train when one is customarily given is recognized as common law ground of negligence.

*Kurn vs. Stanfield* (8th Cir.), 111 Fed. (2d) 469.

*Line vs. Erie R. Co.* (6th Cir.), 62 Fed. (2d) 657.

*St. Louis & S. F. Ry. Co. vs. Jeffers*, 276 Fed. 73.

- (b) Petitioner excepted to the court's withdrawal from consideration of the jury the ground of negligence charging failure to receive a signal from decedent (R. 257) and in this we believe the Court was in error. The testimony on this negligence, however, was not withdrawn and manifest error was apparent on the face of the record and the Circuit Court had a right to consider the entire record in support of the judgment, and if error appeared whereby petitioner could be granted any relief which did not enlarge the judgment of the lower court, the Circuit Court had a right to grant same.

*Smith Engineering Co. vs. Rice* (9th Cir.), 102 Fed. (2d) 492. Cer. denied 307 U.S. 637; 83 L. Ed. 1519.

*Texarkana vs. Arkansas, Louisiana Gas Co.*, 306 U.S. 188; 83 L. Ed. 598.

*Morley Construction Co. vs. Maryland C. Co.*, 300 U.S. 185; 81 L. Ed. 593.

*Alexander vs. Cosden Pipe Line Co.*, 290 U.S. 484; 78 L. Ed. 452.

## QUOTING FROM AUTHORITIES

Referring briefly to the case of *Gildner vs. B. & O. R. Co.*, (2d Cir.), 90 Fed. (2d) 635, wherein the same rule reading "*engine bell must be rung when the engine is about to move*", the Court construing the rule held:

"The indiscriminate ringing of bells in a switching yard has been disapproved by the Supreme Court as tending rather to confuse than warn. (*Aerkfetz vs. Humphreys*, 145 U.S. 418) \* \* Toledo St. L. & W. R. R. Co. vs. Allen, 276 U.S. 165 \* \* \* but the first clause of the rule required the bell only at the start \* \* \* The convenient and safe way is to ring the bell whenever the engine moves and the rule ought to be so understood \* \*. We see nothing in the assertion that the plaintiff assumed the risk of being struck from behind by walking where he did. Nobody has ever been able to say just where assumption of risk ended and contributory negligence began; *but if the rule meant what we have said there could be no assumption of risk unless the bell was rung.*"

In *Montgomery vs. Baltimore & O. R. Co.* (6th Cir.), 22 Fed. (2d) 359, where the same Rule 30 was involved, the Court held:

"Such a safety rule is, as against the defendant, substantial evidence that reasonable care requires the precaution which the rule directs; \* \* \* its own rules furnishing competent evidence as against itself of a proper standard of care. Taft, Circuit Judge in *B. & O. Ry. vs. Camp* (C. C.A. 6th), 65 Fed. 952, 960. See Baldwin on Personal Injuries, Sec. 358, p. 428.



"(3) If the starting of the engine without the bell was not negligent, there was no case. *If it was, we cannot say plaintiff assumed the risk*".

Judgment for plaintiff affirmed.

In *Lehigh Valley R. Co. vs. Mangan* (Admx.), (2d Cir.), 278 Fed. 85, Mangan, a freight conductor, was working on an adjoining track alongside of the engine of his train, to see whether a defect had been removed, when his train was just starting. He was struck and injured by the engine of another train on an adjacent track. In such case a company rule similar to Rule 30 was involved (quoting from the opinion p. 90) :

"That rule directed *that the engine bell must be rung \* \* \* while passing trains on adjacent tracks*. If the rule had been obeyed, the bell on the engine which struck him would have been clanging continuously from the time the engine was nearly one-third of a mile away up to the instant it struck him. At the rate of travel—30 miles an hour—its clanging would have gone on continuously for 40 seconds before he was struck, bringing its warning nearer to him every moment and giving him ample time to step out of the path of the approaching engine, which would have required not more than the fraction of a second. \* \*. In going upon the west bound track under the circumstances did Mangan assume the risk of being struck by a train running over that track? *The court below was of the opinion that the doctrine of assumption of risk was not applicable to the case \* \* \**"

(The court then said that he would give any of defendant's requests on that subject which the counsel for plaintiff assented to. Certain instructions



were then given which were assented to and others rejected. To the rejected instructions defendant excepted and they were assigned as error. The court in passing stated) :

"(5 & 6) The only negligence charged against the defendant was that it failed to give any warning of the approach of the train which killed the defendant, and especially that it violated its own private rule requiring that the engine bell should be rung while the engine was passing a train on an adjacent track. *Mangan did not assume the risk of any injury arising from the failure to obey that rule*; and any instruction as to assumption of risk should have made that fact clear. Neither do we think that under the circumstances it could properly be said that Mangan was on the track voluntarily and for his own convenience. It seems to us that he was there in the discharge of his duty and because it was necessary for him to be there."

Judgment for plaintiff affirmed.

*Wyatt vs. N. Y. O. & W. R. Co.*, (2d Cir.), 45 Fed. (2d) 705. Certiorari denied, 283 U.S. 829; 75 L. Ed. 1442. Wyatt, a brakeman, working with train crew in making up interstate train, was injured while gathering coal for stove in warming dugout. The Court held, quoting from opinion :

"It is another question whether the defendant owed plaintiff any duty in regard to warning him of the approach of the engine. At the moment he was not doing anything in his employment, but something which concerned his own comfort and that of his fellow employees. However, the practice of gathering fallen coal for the dugout fire was of long duration—certainly long enough to charge the defendant with notice of it. The co-

ductor told Wyatt to get coal for the fire. There was implied, if not express, permission given him to go upon the tracks for this purpose. We hold that employees who are rightfully upon the tracks are entitled to the benefit of this rule, even though not at the moment engaged in work for the company. Hence, defendant owed plaintiff the same duty of care as though he were directly engaged in moving its cars; *and a failure to sound the cautionary signal required by the rule was a violation of that duty.* It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to rely upon his own watchfulness to keep out of its way. *Aerkfetz v. Humphreys*, 145 U.S. 418, 12 S. Ct. 835, 36 L. Ed. 758; *Chesapeake & Ohio Ry. v. Nixon*, 271 U.S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, St. L. & W. R. R. Co. v. Allen*, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513. But this court is committed to the doctrine that those decisions are inapplicable when the railroad violates *its own rule requiring the ringing of the engine bell when the engine is about to move.* *Pacheco v. N. Y., N. H. & H. R. R. Co.*, 15 F. (2d) 467 (C.C.A. 2)."

We have quoted from the above authorities for the purpose of illustrating to this Court how other Circuit Courts have construed the rule involved in the case at bar, and held that assumption of risk was not a defense, and to show the varied and different positions taken by different railroads to escape liability and avoid the operation of a standard rule which had been adopted by them as well as the Union Pacific Railroad, for the safety of their employees, and also to show the distinction between the case at bar and the case of *Toledo, St. L. & W. R. R. Co. vs. Allen*, 276 U.S. 165;

relied upon by the Circuit Court of Appeals in writing its decision dismissing petitioner's action, and how other Circuit Courts of Appeals had likewise made their distinction and held that the Toledo case did not apply where a promulgated rule was involved.

### CONCLUSION

Your petitioner has endeavored to keep within the rules and limit this brief in all possible respects. Hearing upon the merits will, of course, disclose more fully the erroneous decision of the Circuit Court of Appeals. We submit, however, that we have shown that petitioner's constitutional rights have been violated and that the Circuit Court's judgment is in direct conflict with the decisions of the Supreme Court and other Federal Court Circuits on similar questions and that in any event where the defense of assumption of risk (if applicable at all) is submitted to the jury under proper instructions, its verdict is conclusive on the question.

While the \$10,000.00 judgment obtained in this case, of which no complaint was made of amount, may not be of great magnitude when compared to the amount involved in many of the cases heard by this Court, it is a matter of grave concern to petitioner as widow of deceased, who has lost her sole support, that her rights be protected under the Federal law and that her rights under the Constitution be preserved by this Court.

We therefore earnestly pray the Court to grant the writ that these rights may be protected.

Respectfully submitted,

BERTHA A. OWENS, Executrix  
of the Estate of Leyle F. Owens,  
Deceased, *Petitioner*.

By FRANK C. HANLEY,  
Attorney for Petitioner,

**In the Supreme Court  
of the United States**

OCTOBER TERM, 1942

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BERTHA A. OWENS, Executrix of the Estate  
of Leyle F. Owens, Deceased,

*Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation,

*Respondent.*

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**REPLY BRIEF OF PETITIONER**

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On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Ninth Circuit.

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**REPLY BRIEF OF PETITIONER**

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On Writ of Certiorari to the United States Circuit  
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Petitioner is relying upon her brief filed in support of petition for writ of certiorari which states the points she intends to raise and the authorities to be relied upon in the hearing of this cause. The purposes therefore of this brief will be to reply to the points raised by respondent in its brief which will be replied to in their order.



## ASSUMPTION OF RISK

## ARGUMENT

## I.

**Replying to respondent's contention that the Circuit Court of Appeals correctly held as a matter of law decedent assumed the risk:**

Respondent to bear out its position that decedent assumed the risk as a matter of law to sustain the decision of the Circuit Court relies solely upon what it claims is testimony that is uniform and uncontradicted that it was the universal custom and practice not to ring the engine bell in ordinary *switching operations* and *switchyard movements*, except when crossing the street or when necessary to warn section men or someone actually seen or known to be on the track, and refers to testimony of the following witnesses in support thereof, to which petitioner also directs the Court's attention.

Witness Koefod's testimony with reference to ringing the engine bell all related to *switching movements* (R. 80-81).

Superintendent P. T. McCarthy limits his testimony to so far as he knew by stating he never noticed the bell rung in ordinary *switching movements* (R. 187). He was never a switchman (R. 182) nor did he testify that knowledge of any kind was brought home to decedent of the failure to ring the bell.

Yardmaster D. B. Pidcock after testifying the bell was not rung in ordinary *switching movements* stated he believed Mr. Owens followed the practice of switching without the bell being rung. He did not state that he knew Mr. Owens followed such practice nor had he seen him do so (R. 197). He further testified that the ringing of the bell was up to the enginemen and that the engineer and fireman were supposed to obey the rules of the Company—that they were bound by them (R. 199-200).

A. Rutherglen, safety agent. On any testimony he gave he did not in any way bring knowledge home to Mr. Owens regarding the ringing of the bell, nor did his testimony show that he was employed by respondent when the accident occurred, nor did he ever work in the Spokane yards. (R. 203-206)

C. N. Richards, engineer, testified he did not ring the bell in *battlefield operations* (which means *switching movements*) except over road and street crossings and when someone was seen or known to be on the track, etc. (R. 207)

F. H. Lang's testimony clearly shows he hadn't worked with Mr. Owens for over ten years and did not pay any attention to his crew (R. 210-211).

It will be noted that all of the foregoing testimony with reference to ringing the engine bell relates to (1) *switching movements*, and (2) "*switching operations*" which literally means actual movement of the engine and cars.

At the expense of repetition which we have heretofore referred to in former brief, petitioner again states that Rule 30 relied upon provides that "*Engine bell must be rung when the engine is about to move*". Negligence charged by petitioner was failure "*to ring the bell of the engine as provided by the aforesaid rule, before moving said engine and cars or when same were about to move*".

We do not find any testimony whatsoever in the record that it was the custom or practice not to ring the engine bell when the engine was *about to move or immediately preceding its movement*, which was all that the rule required and it was on respondent's enginemen's negligent failure to ring the bell when the *engine was about to move or immediately preceding its movement* that the jury found its verdict in favor of petitioner.

The foregoing testimony relied upon by respondent could not set in operation the doctrine of assumption of risk against decedent as petitioner made no claim that respondent's enginemen were guilty of negligence because they failed to ring the engine bell during the actual switching movement. The distinction between ringing the engine bell when the engine is about to move and ringing the engine bell during the switching movement is clearly defined in the following authorities wherein the same rule reading "engine bell must be rung when the engine is about to move" is construed:

Giltner vs. Baltimore & O. R. Co. (2nd Cir.), 90 Fed. (2d) 635 (Cited p. 29 Petition for certiorari and brief).

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359 (Cited p. 29 Petition for Certiorari and Brief).

Respondent cites the cases of Toledo, St. L. & W. R. Co. vs. Allen, 275 U.S. 165, 72 L. Ed. 513, and Chesapeake & O. R. Co. vs. Nixon, 271 U.S. 218, 70 L. Ed. 914, to support its position and that of the Circuit Court in its decision. The case of Toledo, etc. vs. Allen has been heretofore analyzed and distinguished by petitioner from the case at bar and as well as the decision of the Circuit Court of Appeals and it is no doubt that such case led the Circuit Court of Appeals into error (see Petition for Writ and Brief in support thereof pp. 21-23).

Before passing to the second case cited by respondent we wish to call the Court's attention to the following:

"Under the law it is presumed that decedent proceeded with diligence and due care."

Atchison, T. & S. F. R. Co. vs. Toops, 281 U.S. 351, 74 L. Ed. 896.

Looney vs. Metropolitan R. Co., 200 U.S. 480, 50 L. Ed. 564.

In Chesapeake & O. R. Co. vs. Nixon there was no violation of a specific rule involved. The court in effect held that there was no duty owing to Nixon to

keep a lookout for him and that he assumed the risk because he understood as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. This, and numerous other authorities, where no bell ringing rule is involved, hold that the railway owes no duty whatsoever to track men to warn them of the approach of the train, that such class of men have to look out for themselves and that they assume the risk of being injured unless some extraordinary condition exists. We do not find any authorities that apply this rule of law to switching crews where a specific safety rule applies.

In the case of *Gildner vs. Baltimore & O. R. Co.* where a similar rule was involved with reference to ringing the bell, the court distinguished the case of *Toledo v. Allen*. We quote from opinion:

"The first clause of the rule required the bell only at the start \* \* \*. The convenient and safe way is to ring the bell whenever the engine moves and the rule ought to be so understood."

In passing on the question of assumption of risk the court stated:

"We see nothing in the assertion that plaintiff assumed the risk of being struck from behind by walking where he did. Nobody has ever been able to say just where assumption of risk ended and contributory negligence began; but if the rule meant what we have said, there could be no assumption of risk unless the bell was rung."

In *Montgomery vs. Baltimore & O. R. Co.* where a rule similar to Rule 30 was involved, in passing on the question of assumption of risk the court held

"If the starting of the engine without the bell was not negligent there was no case. If it was we cannot say that plaintiff assumed the risk."

In *Lehigh Valley R. Co. vs. Mangan*, 278 Fed. 85, where a similar rule was involved, the court held that the violation of such rule was negligence and that the conductor did not assume the risk.

It will be noted in the foregoing authorities that a clear distinction is made between the cases cited by respondent and the facts in the case at bar. If there is any evidence whatsoever of assumption of risk in the case, they were wholly questions of fact for the jury.

*Rocco vs. Lehigh Valley R. Co.*, 288 U.S. 275, 77 L. Ed. 743. In this cause it was held (quoting from syllabus) :

"Risks assumed by a track inspector as ordinarily incident to his employment do not include a failure on the part of a motorman operating a train to keep a lookout and to give warning in places where the view of one who might be expected to be on the track or approaching from the opposite direction was shut off. The issues of negligence on the part of a motorman operating a train which collided with an inspector's tricycle approaching from the opposite direction at a curve where the view of the track ahead was obstructed, and of contributory negligence on the part of the inspector are for the jury where storm conditions made

the presence of the inspector likely and the inspector had failed to ascertain the whereabouts of the train as required by a rule of the employer, before starting on his trip."

Respondent makes the further contention that the evidence is uniform and undisputed that the engine bell was not rung during switching movements. Petitioner does not believe from the record of testimony that such is the case.

Witness Hinkle, a yardman and co-worker of decedent, gave the following testimony:

"Q. But in stopping and starting the cars you go by the signals in the Book of Rules is that right? A. Yes sir." (R. 114)

The undisputed evidence shows that Rule 30 is contained in the Book of Rules (R. 137-141) and it is admitted in the evidence and by the witness that all switching operations are done by and with the use of the switch engine (R. 3-17), the mechanical operation of which is in the sole charge of the enginemen (R. 199).

We further find that the testimony given by yardmaster Pidcock is to the effect that the ringing of the bell was up to the enginemen and that the engineer and fireman were supposed to obey the rules and that they were bound by them (R. 199-200).

Switchman Koefod also testified that the Book of Rules regulates the signals they give (R. 79, 81).



Petitioner's position is that the foregoing testimony and the inferences to be drawn therefrom constitutes a definite dispute with the testimony relied upon by respondent.

Like testimony was given in the case of *Chesapeake & O. R. Co. vs. Proffitt*, 241 U.S. 462, 465, 60 L. Ed. 1102, 1105 wherein the question of the custom when running in a cut of cars, to have a man on the front end with a light was in controversy. An experienced witness was called by the defendant and in answer to a question regarding whether the above stated custom existed he replied "Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car". Many other witnesses testified that the above custom did not exist and the testimony relative to the book rule was the only testimony that created the dispute on the custom, and the Court there held that such evidence was considered sufficient to create a dispute in the testimony on the question involved.

See *Kanawha & Michigan Ry. Co. vs. Kerse, etc.*, 239 U.S. 576, 60 L. Ed. 449, 450, wherein this Court considered evidence much more remote than in the case at bar as disputing almost conclusive evidence that decedent brakeman assumed the risk as a matter of law, and held that assumption of risk was a jury question and affirmed judgment recovered for brakeman's death.



See *Tiller vs. Atlantic Coast Line R. Co.*, 87 L. Ed. 446 (decided February 1, 1943) for a learned discussion of the history of the doctrine of assumed risk.

The trial court did not err in referring the question of assumption of risk, if applicable at all, to the jury as under the facts and inferences to be drawn therefrom reasonable minds would differ in their conclusions.

**Replying to Point II (page 13) raised by Respondent in its Brief:**

## **II.**

**A. There was substantial evidence of Respondent's negligence to present the issue to the jury.**

## **ARGUMENT**

Of the five separate grounds of negligence alleged the trial court withdrew four from the jury, but notwithstanding this we believe there was substantial evidence of practice and custom that Koefod should have received a hand or other signal (R. 96-97) from decedent to have also submitted the cause to the jury on sub-division (c) which charged negligence in respect to failure to obtain such signal.

On the sole charge of negligence upon which the cause was submitted to the jury the undisputed evidence shows the existence of Respondent's Rule 30 which provides:

**"Engine bell must be rung when an engine is about to move and when approaching and passing public crossings at grade, stations, tunnels and snow-sheds"**

the charge of negligence being that defendant's enginemen negligently failed to ring the bell of the engine as provided by the aforesaid rule, before moving the engine and cars or when the same were about to move.

Every witness who testified on the subject stated the engine bell was not rung during or preceding the kicking movement which resulted in decedent being struck by the cars thereby causing his injury and death. This is so stated and conceded by appellant in its brief (p. 5). Under this state of facts negligence is clearly shown as *a railroad company rule furnishes competent evidence against itself of a proper standard of care and its violation constitutes actionable negligence.*

*Gildner vs. Baltimore & O. R. Co.* (2nd Cir. 1937), 90 Fed. (2d) 635. This was an action under the Federal Employers' Liability Act by a conductor of a train to recover for injuries suffered in a switching yard. The train of which he was in charge came into the yard and stopped upon a passing track just north of the main track. He walked south across the main track to check some cars on another track that were going to be taken into his train. After checking the cars and going east to the station office he walked back westward to reach his train. In the meantime

some switching had been done whereby four cars had been left on the main track by his own crew, when it was required to pick up.

"The time had come to clear the main track of the four cars left upon it, so that a passenger train might pass. The engine with some cars were backed on to the main track, coupled on to the four cars, and the string of twelve to fourteen in all moved east along the main track until it cleared the 'passing siding' switch, where it stopped, but only long enough to reverse and back into the 'passing siding track'. As it came along that track, the first car of the string struck the plaintiff, who was about ninety feet from the switch, threw him down, and ran over his arm. \* \* \* The fault with which he charged the defendant was in failing to ring the bell at the time the engine, after stopping its eastward movement, began to back the string on to the 'passing siding track'. He relied upon a rule of the road that 'the bell will be rung when an engine is about to move; when moving through tunnels; along the streets of towns and cities; approaching and passing public road crossings at grade, stations and trains on adjacent track'. Whether the bell was rung was in dispute, but the verdict is conclusive that it was not.

"(1) The indiscriminate ringing of bells in a switching yard has been disapproved by the Supreme Court, as tending rather to confuse than to warn (*Aerkfetz v. Humphreys*, 145 U.S. 418, 420, 12 S. Ct. 835, 36 L. Ed. 758; *Toledo, St. L. & W. R. Co. v. Allen*, 276 U.S. 165, 171, 48 S. Ct. 215, 217, 72 L. Ed. 513); but the first clause of the rule required the bell only at the start. On the other hand it is true that anyone who saw the string moving east and stopping just beyond the 'passing siding switch', would have known that it would back out of the main track; the plaintiff admitted

that he knew this, though he would not acknowledge that he could tell which track it might choose. But whether the pause would be only long enough to reverse, or whether something might delay the return for a few moments, no one could say; if the rule were construed to cover any stop whatever, that uncertainty would be met and it would not be necessary to speculate as to when the engine was 'about to move.' \* \* \* The convenient and safe way is to ring the bell whenever the engine moves, and the rule ought to be so understood.

"(2-4) The defendant's other points are less serious. Rule Four required all employees to keep off all tracks except in the discharge of duty, and when stepping out of the way of approaching trains \* \* \* go far enough to clear all running tracks. Before stepping upon or crossing a track they should look in both directions." The argument is that when the plaintiff crossed the main track from south to north he did not look to his right—east; and that if he had, he would have seen the string already moving west to gain the 'passing siding track'. Twice he said that the string was stopped at that time; and there is no reason to suppose the contrary. Moreover, that aside, this rule was no more than a general cautionary regulation; quite different from those whose violation is a bar as distinct from contributory negligence. It is only when the rule prescribes specific conduct that disobedience has so grave a consequence; all the cases in the Supreme Court have been of that kind; we think that the same is true of the lower courts. Indeed to hold that by enacting general admonitions of care as rules, a road can make all carelessness a bar, would repeal section 53 of title 45, U. S. Code (45 U.S.C.A. Sec. 53). We see nothing in the assertion that the plaintiff assumed the risk of being struck from behind by walking where he did. Nobody has ever been able to say just where assumption of risk ended and contributory

negligence began; but if the rule meant what we have said, there could be no assumption of risk, unless the bell was rung. It did not damage the defendant to leave the meaning of the rule to the jury, for the judge should have construed it in the plaintiff's favor anyway. The strictures upon the charge need no discussion." Judgment affirmed for plaintiff."

*Pacheco vs. New York, N. H. & H. R. Co.* (2d Cir.), 15 Fed. (2d) 467 was an action under the Federal Employers' Liability Act by a section hand injured when struck by three cars being backed on switch track in freight yards without a warning as required by the Company's rule, which was charged as negligence.

"There was no one on the rear of the cars to warn employees at work on the tracks, nor did the switching engine ring its bell, either when starting or before crossing the highway. The defendant had promulgated a rule that all engines must ring their bells when about to move, also that they must ring on approaching every public road."

The complaint was dismissed at the close of all evidence on the ground that plaintiff had assumed the risk of such accident.

The defendant contended that under the Massachusetts decisions the rule was for the protection of the train only and not the trackmen and that its violation was no evidence of defendant's negligence. The Court in its opinion stated:

"In none of these cases, so far as appears was there involved a rule which prescribed a specific cautionary signal designed for the protection of the men"

\* \* \*

“(2) As to the measure of the defendant’s negligence, we cannot see any peculiarity in the Massachusetts law. At least it has never been there suggested that a train crew would not be negligent which ran down a trackman in broad daylight, on a clear day and a straight track, by backing down upon him a shift of cars slowly moving along a siding. The doctrine, if it be applicable at all, affects only the question of whether the trackman assumes the risk of the violation of a rule which prescribed a cautionary signal in such a situation \* \* \*.

“(3) Finally, the defendant argues that it is not shown that the plaintiff knew of the rule or acted in reliance upon it. Assuming that to be a relevant fact, which we do not decide, it was matter of defense, which must be proved.

Judgment reversed, and new trial ordered.”

In *Montgomery vs. Baltimore & O. R. Co.*, 22 Fed. (2d) 359 Montgomery, a fireman, was injured by starting of engine causing doors on engine to swing together catching his arm and injuring it. Negligence charged was failure to warn. The trial court directed a verdict for the defendant which the appellate court reversed holding: (quoting from opinion)

“(1) We think there was substantial basis from which the jury might infer that the starting of the engine without any warning was an act of negligence as against plaintiff. Rule 30 of the operating department is as follows: ‘The bell will be rung when an engine is about to move; while moving through tunnels; on the streets of towns and cities; approaching and passing public road crossings at grade, stations and trains on adjacent tracks.’



"(2) We think the natural interpretation of this rule is that it was intended as well for the protection of employees on and about the engine as for the protection of persons upon the track. We find nothing in the accompanying rules, or otherwise in the context, to indicate any other construction. It is obvious that a starting of the engine without warning might find a fireman or a brakeman upon the engine or tender in a position where merely an ordinary and careful starting movement might cause him to fall or be otherwise hurt, and it would require clear proof of established custom to justify treating this rule as not intended for the benefit of employees on the engine or tender. Such a safety rule is, as against the defendant, substantial evidence that reasonable care requires the precaution which the rule directs; '\* \* \* its own rules furnishing competent evidence, as against itself, of a proper standard of care.' Taft, Circuit Judge in *B. & O. Ry. v. Camp* (C.C.A. 6) 65 F. 952, 960. See Baldwin on personal injuries, Sec. 358, p. 428.

"(3) If the starting of the engine without the bell was not negligent, there was no case. If it was, we cannot say that plaintiff assumed the risk."

*Atchison, T. & S. F. Ry. Co. v. Ballard*, 108 Fed. (2d) 768 (5th Cir. 1940). *Certiorari denied* 84 L. Ed. 1413, 310 U.S. 646. This was an action under the Federal Employers' Liability Act by an engineer for injuries sustained when his train collided with a standing train. Negligence charged was that the fireman of the engineer's train failed to keep a proper lookout. The plaintiff himself was charged with negligence in violating defendant's specific rules, Rule 93 which provided in effect all except first class trains will move

within yard limits at restricted speed, the train he was operating being other than a first class train. By Rule D-153 restricted speed was defined as "Proceed, prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced". There was a judgment for the engineer and the Railroad Company appealed. The judge throughout his charge failed to instruct the jury, as he should have done, that the violation by plaintiff of specific rules such as Rules 93 and D-153 would of itself constitute negligence, and further the charge did not properly advise the jury as to the weight to be attached to the rules, that is, as to their force and effect. (Quoting from the opinion) :

"(2-5) We think appellant is right. It is true, that a violation of company rules for the conduct of its employees, general in terms, will not ordinarily constitute negligence as matter of law. Nor will observance of such rules, as matter of law, necessarily be due care, but it will be for the jury to say, considering the rules along with the evidence as a whole, whether there was negligence. *Gildner v. B. & O. R. Co.*, 2d Cir., 90 F. (2d) 635; *Rocco v. Lehigh Valley R. R. Co.*, 288 U.S. 275, 53 S. Ct. 343, 77 L. Ed. 743; *Miller v. Central R. Co. of New Jersey*, 2d Cir., 58 F. (2d) 635; *Hall v. Chicago B. & N. R. R.*, 46 Minn. 439, 49 N.W. 239. *A violation of specific rules though, will constitute negligence just as their observance by others, will, in relation to the violator, constitute due care*, *Miller v. Central R. Co. of New Jersey*, and other cases, *supra*. Thus, as applied to the question at issue, if the rule for keeping the train at restricted speed had stopped there, without more, it would have left the matter greatly one of judgment and



it would be a question of fact under the opinion of witnesses qualified to give opinions, whether in the particular case, there was negligence in failing to observe it. But where as here, there is a precise definition of restricted speed, the question of what the rule means and requires, is a *question of law for the court*, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant." \* \* \*

Reversed and remanded.

*Lehigh Valley R. Co. vs. Mangan*, 278 Fed. 85. This was a cause under the Federal Employers' Liability Act by a freight conductor who was working on an adjoining track along side of an engine of his train which was just starting, to see whether a defect had been removed. He was struck and injured by another train on an adjacent track. The Railway Company rule directed that the engine bell must be rung \* \* \* while passing trains on adjacent tracks. The Court held that violation of such rule by the crew of the train which struck him was negligence and that the conductor did not assume the risk of such negligence.

Respondent relies on the cases of *Aerkfetz vs. Humphreys*, 145 U.S. 418, 36 L. Ed. 758, and *Toledo St. L. & W. R. Co. vs. Allen*, 275 U.S. 165, 72 L. Ed. 513, to sustain its position that failure to ring a bell as a

warning in switching operations is not a common law ground of negligence. Under the facts in the Aerkfetz case the Court held the ringing of bells on switch engines moving forwards and backwards would have tended to confuse.

In the Toledo case the plaintiff who was a car checker, predicated negligence on a failure to maintain adequate space between tracks in yards and failure of switch engine to ring a bell or blow a whistle to give warning of approach of a car to plaintiff. The undisputed evidence showed that the space between the tracks was sufficient to enable plaintiff to keep out of the way of moving cars although the danger would have been less if the space were greater and that the cars which injured plaintiff were detached from the engine, and that plaintiff was 300 or 400 feet away from the lead track and the engine was from 20 to 25 car lengths farther (altogether a distance of 1300 feet) and by reason thereof the ringing of a bell or sounding of a whistle would have been of no use to plaintiff as a warning. Citing Aerkfetz case. The Court further held that spacing of tracks was an engineering question and should not be left to the jury and for the reasons above stated judgment for plaintiff was reversed.

It will be noted that neither of these cases involved any rule adopted by the railroad for the ringing of a bell or giving any warning when the engine was about to move. There is a clear distinction in the facts of these cases and the case at bar. In the instant case

Rule 30 exists which provides that the bell shall be rung when the engine is about to move. The engine according to the testimony was about 100 feet away (R. 55-56) from where decedent was at the switch and he was in a position where he could have heard the bell had it been rung and it would have served as a warning to him.

Gildner vs. Baltimore & Ohio, *supra* from which has been quoted at length, is similar to the facts of this case with a like rule requiring the ringing of the bell when the engine is about to move, and it is there pointed out that the indiscriminate ringing of bells in a switch yard has been disapproved in the Aerkfetz and Allen cases :

"But the first clause of the rule required the bell only at the start. On the other hand it is true that anyone who saw the string move east and stopping just beyond the passing siding switch would have known that it would back out of the main track; the plaintiff admitted that he knew this though he would not acknowledge that he could tell which track it might choose. But whether the pause would be long enough to reverse, or whether something might delay the return for a few moments, no one could say; if the rule were construed to cover any stop whatever, that uncertainty would be met and it would not be necessary to speculate as to when the engine was 'about to move'. \* \* \* *The convenient and safe way is to ring the bell whenever the engine moves, and the rule ought to be so understood.* \* \* \* It did not damage the defendant to leave the meaning of the rule to the jury for the judge should have construed it in the plaintiff's favor anyway."

This construction of the rule applies with equal force and effect to our case here. The rule is unambiguous and means just what it says. The learned trial judge upon whom devolved the duty of construing the rule (see *Pascheo*, *Montgomery* and *Atchison* cases, *supra*) thought so when he stated:

"I feel there is evidence here of negligence on the part of the defendant because of the failure of its employees to comply with the rule which the defendant company had adopted. Clearly there is a causal connection—if Mr. Owens was relying—if we presume he was taking care for his own protection and was relying on that rule, and he had a right to rely upon thinking the bell would be rung when the engine was about to move, and the engine was close enough to him so if the bell had been rung he would have heard it, then there certainly is a causal connection between his accident and the failure to ring the bell" (R. 172).

The cases hereinbefore cited sustain petitioner's position that the violation of Rule 30 which was a specific rule for the conduct of respondent's enginemen, constitutes actionable negligence and that under the facts of the case as found by the jury under appropriate instructions by the Court, was the proximate cause of decedent's injury and resultant death.

**B. The next contention made by Respondent is that Rule 30 was not intended for the benefit of decedent although the rule obviously was for the protection of the public, and employees other than members of the**

switching crew who might not be apprised of the movement or approach of the switch engine (Resp. Brief 18-23) and cites as authority for its position *Thompson vs. Downey*, 78 Fed. (2d) 487, and *Central Vt. Ry. Inc. vs. Sullivan*, 86 Fed. (2d) 171.

The Thompson case was an action for the death of a section foreman who was killed while operating a hand car, by a train which overtook him. The section foreman had been with the company for 20 years and was experienced. On the morning in question the foreman failed to get a line-up of the trains which he was required to meet. The evidence showed that the train gave the usual crossing signal as it approached the crossing which it passed just prior to colliding with the section foreman. Quoting from the opinion:

"In the instant case all warning signals were given. There was no unusual or extraordinary condition present respecting the track, the curve or the weather. The record does not disclose that decedent had a scheduled time for inspecting the road nor that the train crew knew or had cause to know or expect that decedent would be on the curve. Instead of there being a blind curve, decedent, had he looked could have seen the train on any part of that curve, and for a distance of 4,000 feet below the point where he was struck. Under the circumstances here presented we think the court could not say, and the jury should not have been permitted to say, that the risk involved was not one which was ordinarily incident to decedent's employment. There was no duty owing decedent by the engineer or fireman, on account of unusual circumstances, hence there was no liability on that ground. In the absence of proof that decedent

was exposed to some unusual danger, it cannot be held that the engineer and fireman were in duty bound to give him warning. They had a right to believe that he would keep out of the way of the train."

It will be noted that in the foregoing case all warning signals were given. This case turns on the application of the doctrine of assumption of risk and there was no such rule involved as in the instant case. The rule No. 1218 there involved was construed by the court as not being promulgated for the safety and protection of decedent apparently in view of the fact that it governed the duties of the fireman and his assistance to the engineer in keeping a lookout for signals and obstructions and such obstructions which the fireman was to keep a lookout for did not include the section foreman.

In the Central Vt. Ry. case the company rule there providing for the spacing of trains was obviously made for the benefit of the trains and their regulation and it was rightfully held was not made for the benefit of the section foreman.

Referring to Rule 59 appellant quotes:

"It may however be claimed that Sullivan was entitled to the benefit of Rule 59 requiring ample warning by whistle to a person on the track, bridge or trestle. This rule has to do with a person seen or known to be on the track in a position of danger. Sullivan, a section man, was not entitled to the benefit of the rule unless he was seasonably seen or known to be on the track or bridge in such position"



to which we add, quoting from opinion :

"The rules provided that 'employees, in accepting employment, assume its risks'; and 'are required to exercise care to avoid injury to themselves and others. They must expect trains to run at any time, on any track, in either direction, and when a train is approaching must stand clear of all running tracks.' Here the whistle was blown and Sullivan made aware of the approaching train as soon as he was seen or known to be in a position of danger, and the plaintiff was not entitled to go to the jury on this ground."

The evidence in the case clearly shows that other rules as above quoted were involved that had to do with the conduct of Sullivan, and in addition thereto the whistle was blown and Sullivan made aware of the approach of the train as soon as he was seen and known to be in a position of danger. The facts in our case here are different as Rule 30 provided for ringing the bell when the engine was about to move and was made for the benefit of the switch crew including decedent. It is so held in the *Gildner*, *Pacheco*, *Montgomery*, *Atchison*, *T. & S. F. Ry. Co.*, and *Lehigh Valley R. Co.* cases, *supra*, and in addition thereto we cite :

*Wyatt vs. N. Y. O. & W. R. Co.*, 45 Fed. (2d) 705. Certiorari denied, 283 U.S. 829, 75 L. Ed. 1442. *Wyatt*, a brakeman, working with train crew in making up interstate train, was injured while gathering coal for stove in warming dugout. The Court held, quoting from opinion :

"It is another question whether the defendant owed plaintiff any duty in regard to warning him of the approach of the engine. At the moment he was not doing anything in his employment, but something which concerned his own comfort and that of his fellow employees. However, the practice of gathering fallen coal for the dugout fire was of long duration—certainly long enough to charge the defendant with notice of it. The conductor told Wyatt to get coal for the fire. There was implied, if not express, permission given him to go upon the tracks for this purpose. We hold that employees who are rightfully upon the tracks are entitled to the benefit of this rule, even though not at the moment engaged in work for the company. Hence, defendant owed plaintiff the same duty of care as though he were directly engaged in moving its cars; and a failure to sound the cautionary signal required by the rule was a violation of that duty. It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to rely upon his own watchfulness to keep out of its way. *Aerkfetz v. Humphreys*, 145 U.S. 418, 12 S. Ct. 835, 36 L. Ed. 758; *Chesapeake & Ohio Ry. v. Nixon*, 271 U.S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, St. L. & W. R. R. Co. v. Allen*, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513. But this court is committed to the doctrine that those decisions are inapplicable when the railroad violates its own rule requiring the ringing of the engine bell when the engine is about to move. *Pacheco v. N. Y., N. H. & H. R. R. Co.*, 15 F. (2d) 467 (C.C.A. 2)."

It will be noted in the last case cited, as well as the other cases referred to, that the rule with reference to ringing the bell was held to be for the benefit of the members of the switching crew. Decedent while



he was the engine foreman, worked under the supervision and direction of the yardmaster and also the superintendent, had no control whatsoever over the mechanical operation of the engine. That was left entirely to the engineer and fireman and they were bound by the provisions of the rule, as testified to by yardmaster P. D. Pidcock (R. 199-200).

There is no evidence that decedent gave any signal whatsoever for the movement of the engine and cars in this switching operation. The only remote testimony on this point is that Koefod, a switchman, testified the decedent said "let these go to 13" and from that he understood that the cars should be kicked (R. 71-72).

Obviously there is no escape from the fact that the provisions of Rule 30 was made for decedent's benefit and he had a right to rely upon the enginemen complying with its provisions and expect the bell to ring before the engine moved.

Plaintiff contends that without exception every case cited by the petitioner is distinguished on the vital point that the injured employee was not in charge of nor taking part in the switching operation. We do not understand this to be a fact and in contradiction thereof cite the case of Giltner vs. Baltimore & Ohio, *supra*. It was the crew of the injured conductor that were doing the switching when he was injured.

## **CONCLUSION**

Petitioner submits that the case was properly submitted to the jury on the issue of negligence as well as the question of assumption of risk if applicable at all, and that the Circuit Court of Appeals erred in its decision and the same should be reversed and the judgment of the trial court affirmed, or in the alternative a new trial be granted.

Respectfully submitted,

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FILE COPY

No. 580

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IN THE  
**Supreme Court**  
OF THE  
**UNITED STATES**

---

BERTHA A. OWENS, Executrix of  
the Estate of Leyle F. Owens, De-  
ceased,

*Petitioner,*

v.

UNION PACIFIC RAILROAD  
COMPANY, a corporation,

*Respondent.*

---

BRIEF OF RESPONDENT UNION PACIFIC  
RAILROAD COMPANY OPPOSING PETITION  
FOR CERTIORARI

---

*To the United States Circuit Court of Appeals  
for the Ninth Circuit*

---

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IN THE  
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BERTHA A. OWENS, Executrix of  
the Estate of Leyle F. Owens, De-  
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UNION PACIFIC RAILROAD  
COMPANY, a corporation,

*Respondent.*

---

BRIEF OF RESPONDENT UNION PACIFIC  
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---

STATEMENT.

The statement of the case as set forth in the opinion of the Circuit Court of Appeals for the Ninth Circuit is sufficient.

129 Fed. (2nd) 1013 (R., pages 268 to 274.)

ARGUMENT.

This cause of action arose on February 16, 1939, prior to the August 11, 1939, amendment to the Federal Employers' Liability Act. There is no dispute as between the parties but that the action is governed by the provisions of the law as they existed prior to the

amendment. (See Summary Statement in Petition for Writ of Certiorari, page 6.) Under these provisions assumption of risk is a complete defense, except in cases involving violation of some Federal Safety statute.

45 U. S. C. A., Sec. 54; 35 Stat. 66, Sec. 4.

While other grounds were presented by respondent before the Circuit Court of Appeals to support its judgment, the decision was based on the single ground that petitioner's decedent assumed the risk as a matter of law. (R., page 274.)

Much of the petition and of the brief in support of the petition for writ of certiorari is devoted to a discussion of various alleged grounds of negligence on the part of the respondent. (See pages 2, 3, 4, 8, 12, 17, 24 and 28.) These claimed grounds of negligence, including the alleged failure to keep a look-out, to give a warning, to provide a safe place to work, to receive a hand signal, were eliminated by the trial judge prior to submission of the case to the jury. These matters were not before the Circuit Court of Appeals for consideration. (R., 168 to 169.) The only issues submitted to the jury were the question of respondent's failure to ring the engine bell, the question of proximate cause and the question of petitioner's assumption of risk. The Circuit Court of Appeals, on the basis of the undisputed testimony that over a period of more than twenty years it had been the custom of the company's employees, including the decedent, not to ring or re-

quire the ringing of any bell in ordinary switching movements, held as a matter of law that decedent assumed the risk.

The only claim of petitioner that there is a conflict in the testimony on this particular issue of assumption of risk is made on page 9 of the petition, and on page 17 of the brief referring to the testimony of petitioner's witness Hinkle. Reference to the two or three questions and answers preceding the testimony referred to indicates that this witness was discussing not the matter of ringing the bell by the engineer, but rather the hand or lamp signals given by switchmen in stopping and starting the cars.

"Q. You have no signals, that is, there are no signals you go by, hand or lamp signals, except those detailed in your book of rules?

A. Yes, we have signals we use in yard work—it does not show in the book of rules for instance, track signs—there is no track signs given in the book of rules I ever noticed. That is a made-up rule that has been followed from one generation to the other.

Q. That is like the sign you got to flag the crossing?

A. Yes.

Q. But for stopping and starting of cars, you go by the signals detailed in the books of rules—is that right?

A. Yes." (R., pages 113 to 114.)



## 1.

*The Supreme Court will not ordinarily grant certiorari simply to review evidence or to discuss specific facts.*

*U. S. v. Johnston*, 268 U. S. 220 at 227; 69 L. Ed. 925, at 926.

## 2.

*The question of a conflict with decisions of other Circuit Courts of Appeal or with applicable decisions of the Supreme Court has become academic.*

Without conceding that there is any conflict either with decisions of other circuits or with applicable decisions of the Supreme Court, it should be pointed out that an amendment to the Federal Employers' Liability Act of August, 1939, eliminating the defense of assumption of risk, renders the question of possible conflicts under the former statute academic. The Supreme Court need not consider academic questions.

See *Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364, at 375; 83 L. Ed. 221, 230.

It seems clear that in view of the 1939 amendment to the Federal Employers' Liability Act any decision now rendered on the law of assumed risk as it existed prior to that amendment would not settle any question of present general interest. Nor would it be likely to serve the purpose of eliminating conflicts in the decisions of the Circuit Courts of Appeal as to the former law. The statute as amended itself serves the purpose of creating a new uniformity.

45 U. S. C. A. Supp., Sec. 54; 53 Stat. 1404, Sec. 1.

*There is, in any event, no conflict as between the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case and any decisions of this Court, or of Circuit Courts of Appeals on the law of assumed risk as it existed prior to the amendment.*

This is a matter wherein each case depends peculiarly upon its own facts. The present case differs from any case cited by petitioners in that petitioner's decedent himself was the foreman in charge of the switching operation and decedent himself gave the verbal instruction for the switching movement which resulted in his death. As stated by the trial judge in passing on one of the other alleged grounds of negligence at the trial:

"I don't think under the testimony there was any necessity for further hand signals. The decedent Owens had orally instructed the field switchman to kick back those two cars and had the right to apprehend they would be kicked back." (R., page 169.)

Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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FILE COPY  
No. 590

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IN THE  
**Supreme Court**  
OF THE  
**UNITED STATES**

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BERTHA A. OWENS, Executrix of  
the Estate of Leyle F. Owens, De-  
ceased,

*Petitioner,*

v.

UNION PACIFIC RAILROAD  
COMPANY, a corporation,

*Respondent.*

---

ANSWER BRIEF OF RESPONDENT UNION  
PACIFIC RAILROAD COMPANY

---

*Upon Certiorari to Review the Decision of the United  
States Circuit Court of Appeals for the  
Ninth Circuit*

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PACIFIC RAILROAD COMPANY

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*Upon Certiorari to Review the Decision of the United  
States Circuit Court of Appeals for the  
Ninth Circuit*

---

STATEMENT OF THE CASE

This action was brought under the Federal Employers' Liability Act by Bertha A. Owens as executrix of the estate of Leyle F. Owens, her deceased husband. In her first cause of action plaintiff sought recovery for the personal injuries, pain and suffering sustained by her husband prior to his death and in

her second cause of action for her loss of support and maintenance resulting from his death. (R., pp. 1-8.)

Both causes of action set out five separate grounds of alleged negligence on the part of respondent railroad or its employees which were alleged to have proximately caused the death of plaintiff's decedent. At the close of all the evidence the trial judge found that four of the alleged grounds of negligence and the proof submitted by plaintiff in connection therewith were legally insufficient to submit to the jury. The case was submitted however on the one remaining ground of negligence: namely, the alleged violation of Company rule 30 relating to ringing the engine bell. (R., p. 215.)

The allegations of plaintiff's amended complaint relative to the one ground of negligence permitted by the court to go to the jury were to the effect that "during all of the times herein mentioned defendant had in force \* \* \* a further rule providing '30. *Engine bell must be rung when an engine is about to move and when approaching and passing public crossings at grade, stations, tunnels and snowsheds.*' \* \* \* that the aforesaid injuries to plaintiff's decedent causing his death were due proximately to the negligence of the defendant in the following respects: \* \* \* (d) that defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move; \* \* \*'" (R., pp. 3, 5, 7.)

The answer of defendant to said allegations admitted that said rule was in force but alleged "that said rules, and each of them, had no application in any way to the switching movement which was being made at the time of the alleged accident. \* \* \*". The answer denied that defendant or its enginemen were negligent in failing or neglecting to ring the bell. (R., pp. 10, 12, 14), and affirmatively alleged that decedent had assumed the risk, and that his own negligence was the proximate cause of his death. (R., 16 and 17.)

Plaintiff's decedent died from injuries received when he was run over by two freight cars which were being moved in the course of switching operations in respondent railroad's switchyard in Spokane, Washington. Both of decedent's legs were crushed necessitating amputation and resulting in death within 2½ hours after the accident. At the time of the accident which occurred during daylight hours around 3:15 P.M., on February 16, 1939, decedent was employed by respondent railroad as Engine Foreman and was in charge of the switching operation which occasioned his injuries and death. (R., pp. 53, 195.) Working with decedent and subject to his orders were two other switchmen, Koefod and Hinkle, and the engine crew composed of engineer Richards and fireman Seal. (R., p. 195.)

This crew under the direction of decedent was making up a train of freight cars in the old Spokane



switchyard for transfer to various other roads. (R., p. 260.) Operations were conducted over a series of tracks numbered from 1 to 13 and several other tracks designated locally by names such as the "Old Main Line," the "Pendleton," etc. These tracks were all joined by inter-connecting leads and switches. Generally the tracks ran in an easterly and westerly direction crossing Washington Street near the west yard limits and Division Street on the east, both at grade. (Pl. Ex. A.)

On the operation in question the engine had headed west on the old main line and had coupled onto 2 box cars near Washington Street. The engine then backed up easterly pulling the 2 cars. During this movement decedent Owens was riding on the stirrup, holding the grab irons on the north side at the west end of the car coupled to the engine, and his switchman Koefod was riding about 3 or 4 feet away from him on the north side of the next car. (R., p. 56.) While riding in this position Owens verbally instructed Koefod to "let these cars go 13." (R., pp. 71, 75.) As the cars passed over lead switch No. 7 which served tracks 7, 8, 9, 10, 11, 12 and 13, Owens dropped off and gave the engineer the stop sign. (R., p. 58.) The cars stopped past the switch a distance variously estimated at 7 to 30 feet. (R., pp. 34, 58, 124, 134.) Owens then walked around the west end of the rear car and crossed the track to No. 7 switch stand which was on the south side of the track. Koefod took up a position some 20 feet north of the cars where he could plainly see the

switch points (R., p. 76), although the view of Owens and the switch stand on the south side of the track were obstructed by the cars. (R., p. 59.)

The switch was thrown and as soon as Koefod saw the switch points change into line with No. 13 lead, pursuant to the instructions received from Owens, he signalled the engineer (who was also on the north side) to kick the cars in toward No. 13 track. This same identical movement had been handled by the same crew in this same way many times. (R., pp. 77, 78, 80, 146.)

The engineer in response to the signal gave the cars a kick or quick push and Switchman Koefod pulled the pin uncoupling the cars from the engine permitting the cars to roll on down toward track 13, while the engine stopped and started back toward Division Street to get another car. (R., pp. 66-67.)

No bell was rung during or preceding the kick movement.

Koefod after pulling the pin had stepped on the foot board of the engine and almost immediately his attention was called to a man near Division Street who was pointing back down the track. Koefod looked back and saw Owens lying on the ground on the south side of the track near the switch which he had thrown and over which the cars had just been kicked. (R., p. 68.) On running back to Owens, it was found that his legs had been run over.

There was no testimony or evidence whatsoever as to why Owens got on the track in front of the cars which were kicked. It had been the practice without exception for the man handling the switch on this type of an operation to stay at the switch until the movement had been completed. (R., pp. 44, 86, 194.) No explanation or reason was advanced in any testimony as to why Owens departed from the established practice. The testimony as to the instructions given Koefod by Owens was clear and there was no evidence of any misunderstanding. In fact, the trial court in eliminating one of the other claims of negligence stated: "I don't think under the testimony there was any necessity for further hand signals. *The decedent, Owens, had orally instructed the field switchman to kick back those two cars and had the right to apprehend they would be kicked back.*" (R., p. 169.)

The only witness to the accident was the engineer on another switch engine down the line who looked up and saw Owens in the middle of the track just before he was struck. (R., pp. 36 and 47.) At that moment Owens was looking north and then down the track away from the approaching cars. (R., p. 36.) Had he looked toward them there was nothing to prevent his seeing the cars. (R., p. 48.) Neither was there anything to prevent his hearing the cars. Switchman Hinkle heard the cars moving from 75 feet away. (R., p. 114.)

As already stated it was not contended by respon-

dent railroad that the engine bell was rung during or preceding the kick movement. On the contrary, evidence was offered that it was the custom and practice never to ring the bell in ordinary switchyard movements and that Rule 30 relative to bell ringing was universally understood, interpreted and treated by officers and employees alike as having no application to ordinary switchyard movements. (R., p. 185.)

So far as the issue of assumption of risk was concerned the testimony was uniform that the bell was never rung in ordinary switch movement within the yard unless a street was being crossed, or unless section hands or someone other than the train crew were discovered on the track. (R., pp. 81, 184, 187, 195, 204, 207, 208, 210.) No testimony to the contrary was offered.

The testimony was also uniform that this practice had been the custom for over 20 years—during all of the time Owens had worked there, that Owens was familiar with the practice, and followed it himself, and permitted his crew to follow it. (R., pp. 195, 197, 210.) It appeared that on the day of the accident some 200 switching movements had already been made by Owens' crew, in none of which the bell was rung except when the operation crossed one of the city streets. (R., p. 80.) Nothing was offered by plaintiff to controvert this testimony. One of the points on which respondent relied was that plaintiff's decedent assumed the risk that switching operations would be conducted without the bell being rung.

At the close of plaintiff's evidence, defendant presented a motion for non-suit and dismissal, which was denied by the court. The trial court's ruling is set out at pages 168-174 of the record. At the close of all the evidence a motion for directed verdict was denied. (R., p. 211.)

The trial judge then gave his instructions to the jury, including a peremptory instruction that Rule 30 applied to switchyard operations and that its violation constituted negligence as a matter of law and that if such negligence was a proximate cause of the death of decedent, plaintiff would be entitled to recover, (R., pp. 216-217) unless decedent assumed the risk. (R., p. 223.) This instruction was excepted to by respondent, and was assigned as one of the errors on the appeal to the Circuit Court of Appeals.

The jury returned a verdict for plaintiff for \$2,000.00 on the first cause of action and \$8,000.00 on the second cause of action. (R., p. 247.) Motions by defendant to set aside the verdict and enter judgment for defendant, and in the alternative for a new trial were denied. (R., pp. 252, 253.)

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit the judgment of the trial court was reversed. (R., p. 268; 129 Fed. (2) 1013.)

The present brief is intended to supplement the brief heretofore filed by respondent in opposition to the petition for a writ of certiorari.

ARGUMENT

I.

*The Circuit Court of Appeals correctly held that, as a matter of law, decedent assumed the risk.*

Mr. Owens, plaintiff's own testimony showed, had been continuously employed by the Union Pacific Railroad Company since April, 1917, a period of almost 22 years, up to the time of his death. During that time his work had always been as a switchman, or engine foreman in the Spokane yards. During the last few years his work had been almost entirely that of engine foreman having direct personal charge and supervision of his switching crew. (R., pp. 159-160.)

The testimony was uniform and uncontradicted both from plaintiff's and defendants' witnesses, that it was the universal custom and practice not to ring the bell in ordinary switching operations, in which custom and practice decedent joined. Plaintiff's witness Koefod testified to this effect (R., p. 81):

"Switching up there on the lead when we don't use the crossing or cross a street, we don't use the bell or the whistle."

The testimony of defendants' witnesses was uniform and conclusive, and to the same effect as that given by plaintiff's witness Koefod, namely, that it was the universal custom and practice never to use the bell in ordinary switchyard movements except when crossing the street or when necessary to warn section men or

some one actually seen or known to be on the track. The testimony of these witnesses will be found in the record as follows:

P. T. McCarthy (Division Superintendent), pages 184, 185, 187, 188;

D. B. Pidcock (Yardmaster), pages 195-196;

A. Rutherglen (Northwest Safety Agent), page 204;

C. N. Richards (Engineer), pages 206, 207 and 208;

F. H. Lang (Engine Foreman), page 210.

The cases hold that an employee has assumed the risk as a matter of law in circumstances similar to those involved here. Two decisions of the Supreme Court will suffice:

*Toledo St. L. & W. R. Co. v. Allen*, 275 U. S. 165; 72 L. Ed. 513;

*Chesapeake & O. R. Co. v. Niron*, 271 U. S. 218; 70 L. Ed. 914.

In the *Toledo* case, the court held that a car checker employed in the railroad company's switchyard, assumed the risk as a matter of law where there was no showing that he was without knowledge or unfamiliar with the switching practices followed in that yard:

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence



of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz v. Humphreys*, supra.

"In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

In *Chesapeake & O. R. Co. v. Nixon*, the court, speaking through Mr. Justice Holmes, held that a section man assumes the risk of injury through neglect of train operators to maintain a lookout while the train is in motion:

"The deceased was an experienced section foreman upon the defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used a three-wheeled velocipede that fitted the rails and was propelled by the feet of the user. He had obtained from his immediate superior, the supervisor of track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at seven in the morning and at half past six on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed.

\* \* \* \* \*

"If the accident had happened an hour later when the deceased was inspecting the track, we



think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection from its employees. (Citations omitted.) The duty of the railroad company toward this class of employees was not affected by that which it might owe to others.

“The permission to use the velocipede in going to his work did not make the defendant’s obligation to the deceased greater than it would have been after he got there.”

It is worth recalling again that on the day of the accident, the decedent and his crew had already engaged in some 200 switching movements, in none of which had the bell been rung, except when the operations crossed one of the city streets. (R., p. 80.) It is also to be remembered that decedent himself had given the switching instruction and knew that the cars would be kicked immediately. (R., pp. 169 and 74-75.) On this state of facts and in view of the custom and practice, the Circuit Court of Appeals correctly found that, “The existence of Company Rule 30, which plaintiff urges should be construed so as to require the ringing of the engine bell even in switching movements, is immaterial on the question of whether or not the decedent assumed the risk where as here the evidence is uncontradicted that the rule had not been so construed by employees including the decedent for more than twenty years prior to the accident.” (R., p. 274.)

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II.

*The decision of the Circuit Court of Appeals is supported by other grounds than that stated in the Opinion.*

A. *There was no proof of negligence on the part of respondent railroad or its employees.*

Although the plaintiff alleged five separate grounds of negligence in her complaint, it has already been noted that the trial judge found the proof to be insufficient as to four of said grounds and eliminated them from the consideration of the jury. The case was submitted to the jury on the single alleged ground of negligence that respondent railroad failed to ring the engine bell pursuant to the provisions of Rule 30, which specifies that "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings, at grade, stations, tunnels and snowsheds."

It is respondent's position that the non-ringing of the bell before or during the switching movement in which decedent was injured furnishes no ground on which negligence can be based, and that the trial court should have so held as a matter of law. This question we submit, has been determined by the decisions of the Supreme Court in the case of *Aerkfetz v. Humphreys*, 145 U. S. 418; 36 L. Ed. 758, and *Toledo St. L. & W. R. Co. v. Allen*, 275 U. S. 165; 72 L. Ed. 513. These two cases establish the rule that at common law

in ordinary switchyard operations, the giving of signals by ringing a bell or blowing a whistle is unnecessary so far as switchyard employees are concerned.

As stated in the *Aerkfetz* case, (page 420):

“The ringing of bells or sounding of whistles of trains going and coming and switch engines moving forward and backward would have simply tended to confusion.”

In the *Toledo* case, an employee working as a car checker was injured by a shunted car in the railroad company's switchyard. He brought action under the Employers' Liability Act, alleging among other things that the defendant was negligent in failing to cause the engine bell to be rung. The Supreme Court reversed the judgment in the employee's favor, holding that the failure to ring the engine bell in switchyard operations did not constitute negligence under the Employes' Liability Act. The decision in the *Toledo* case has never been modified or reversed, and we submit that it is conclusive on the issue here presented.

This is in fact a case where the act of decedent in stepping on to the track in front of the cars was itself the cause of his own death.

*Willis v. Pennsylvania R. Co.*, 122 Fed. (2) 248  
cert. denied 314 U. S. 684; 86 L. Ed. 547.

- B. *The common law rule as established by the Supreme Court decisions above referred to, is not affected in the present case by the existence of Company Rule 30.*

It is well established that unless the employee is one for whose protection the rule is intended, breach of the rule gives rise to no cause of action.

*Thomson v. Downey*, 78 Fed. (2) 487; (C. C. A. 7th, 1935);

*Central Vermont Ry., Inc. v. Sullivan*, 86 Fed. (2) 171; (C. C. A. 1st, 1936);

See also:

*C. & O. Ry. Co. v. Mihas*, 280 U. S. 102; 74 L. Ed. 207.

In the case first cited above, *Thomson v. Downey*, the company rule required the foreman to keep a lookout for signals and obstructions along or on the track. The court held that this rule did not apply for the benefit of the section foreman who was operating a track velocipede at the time he was struck by defendant's train. We quote briefly from the opinion:

"In the absence of proof that decedent was exposed to some unusual danger, it cannot be held that the engineer and fireman were in duty bound to give him warning. They had a right to believe that he would keep out of the way of the train.

*Toledo, St. Louis & Western Railroad Co. v. Allen*, *supra*.

"Appellee contends, however, that under appellant's Rule 1218 it was the duty of the fireman to assist the engineer in keeping a lookout for signals and obstructions. It is not sufficient for one to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to him.

*Chesapeake & Ohio Railway Co. v. Mihas,*  
supra;

*Chesapeake & Ohio Railway Co. v. Nixon,* su-  
pra." \* \* \*

"We are convinced that Rule 1218 was not promulgated for the safety or protection of decedent, and it should not have been admitted in evidence.

"Under these circumstances we are of the opinion that the court erred in not instructing the jury to return its verdict in favor of appellant."

In the *Central Vermont Railway Co.* case a company rule provided that no train could follow a preceding train while the latter was still between the stations. And another rule required a whistle warning to be given to persons on the railroad's track, bridges or trestles. The Circuit Court of Appeals for the First Circuit held that a section foreman who was injured when he was run into on one of the company trestles could not claim the benefit of the rules, and the judgment for the plaintiff was vacated and order entered for the defendant. In its opinion the court uses the following language:

"This is equivalent to claiming that the defendant, in issuing the rules, although indisputably for the protection of its trains, assured its trackmen that obedience thereto could be depended upon by them and thus a duty was imposed upon it, in respect to such trackmen, to see they were obeyed, a position contrary to the well-settled decisions of the federal courts, which hold that a railroad owes no duty toward its trackmen to look out for them and the burden of their protection

from the danger of being hit by passing trains rests upon themselves. *Chesapeake & Ohio Ry. Co. v. Nixon*, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, Etc., R. R. Co. v. Allen*, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Norfolk & W. Ry. Co. v. Gesswine*, (C. C. A.) 144 F. 56; *Thomson v. Downey*, (C. C. A.) 78 F. (2d) 487; *Biernacki v. Pennsylvania R. Co.*, (C. C. A.) 45 F. (2d) 677."

\* \* \*

"It may, however, be claimed that Sullivan was entitled to the benefit of Rule 59 requiring ample warning by whistle to a person on the track, bridge or trestle. This rule has to do with a person seen or known to be on the track in a position of danger. Sullivan, a section man, was not entitled to the benefit of the rule unless he was seasonably seen or known to be on the track or bridge in such position."

We repeat, therefore, that the existence of Rule 30 does not affect the common law rule that no negligence can be predicated on failure to ring an engine bell in switchyard operations—for the reason that Rule 30 cannot be construed as intended for the protection or benefit of an engine foreman under whose personal supervision and instructions the engine was being moved.

Plaintiff's decedent was the engine foreman in charge of the switching crew. (R., pp. 193-195.) As engine foreman he determined what switching moves were to be made, and he had complete control over his two assistants and over the engineer and fireman comprising the engine crew. We are unable to see any escape from the proposition that Rule 30 was not in-



tended for the benefit or protection of any of the members of the switching crew engaged in handling the actual switching movement of the engine and cars.

Obviously, the rule could not be for the benefit or protection of the engineer or fireman seated in the engine cab, who would be the ones to handle the engine brake and throttle to set the engine in motion.

Obviously, the rule could not be for the benefit or protection of the switchman who gave the hand signal to the engineer to move the train.

By the same token and *a fortiori*, the rule cannot be applied to the switching foreman, namely, plaintiff's decedent, who gave the specific instructions to have the engine make this move, and who threw the switch so that the move could be made.

The trial court applied this same reasoning in eliminating one of the other grounds of negligence, when it said (R., p. 169):

"I don't think under the testimony there was any necessity for further hand signals. *The decedent, Owens, had orally instructed the field switchman to kick back those two cars, and had the right to apprehend they would be kicked back.* There was no necessity, in view of the fact hand signals were to be given on that side of the engine where the engineer was located."

It seems to us this same line of reasoning applies with equal strength to the non-ringing of the bell.

In other words, so far as plaintiff's decedent, and the other members of the switching crew were concerned, they were in active charge of the movements of the switching engine. The engine was moved under their instructions and pursuant to their signals. The rule specifying the ringing of the bell could not have been intended to protect them against something which they themselves were doing. The rule was intended for the protection of the public and for the protection of employees other than members of the switching crew—other employees who might not be apprised of the movements or approach of the switch engine.

As stated in the *Toledo* case, so far as plaintiff's decedent was concerned:

“On the evidence it must be held that he knew how switching was done there, and in the absence of proof that he was exposed to some unusual danger by reason of the departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car.”

Without an exception every case cited by petitioner is distinguishable in this regard on the vital point that the injured employee was not in charge of nor taking part in the switching operation. Furthermore in none of the cases presented by petitioner was there undisputed evidence of custom over a long period of years establishing the non-applicability of the rule to ordinary switchyard operations.



**CONCLUSION**

In conclusion, respondent refers once again to the matters set out in its brief opposing the petition for writ of certiorari as supporting a denial thereof. On the merits, respondent respectfully submits that the judgment of the Circuit Court of Appeals should be affirmed on either the ground that decedent assumed the risk as a matter of law, or on the ground that there was no legally sufficient proof of negligence on the part of respondent or its employees.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 580.—OCTOBER TERM, 1942.

Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, De- ceased. Petitioner, vs. Union Pacific Railroad Company.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
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[June 14, 1943.]

Mr. Justice RUTLEDGE delivered the opinion of the Court.

Petitioner is the widow of an employee of respondent. In 1941 she brought this suit under the Federal Employers' Liability Act, 45 U. S. C. §§ 51-59. Her husband's death occurred in the course of his employment as foreman of a switching crew on February 16, 1939. She claims this was due to respondent's negligence. Petitioner sought to recover in one cause of action for Owens' suffering before death and in another for his death. The trial judge withdrew from the jury, for insufficiency of proof, four of the five separate grounds of negligence alleged. The case was submitted on the remaining ground, an alleged violation of Company Rule 30, and the defenses of assumption of risk and contributory negligence. Rule 30 provided:

"Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The jury found for petitioner and a judgment was entered on the verdict. The Court of Appeals reversed without considering the questions of negligence and contributory negligence. It held that as a matter of law Owens assumed the risk of death in the activities in which he was engaged when the accident occurred. 129 F. 2d 1013. We think this ruling was erroneous.

At the time of the accident and for fifteen years before, Owens was employed in the Spokane railroad yards as an engine or switching crew foreman. His crew was composed of himself, the engineer, the fireman, and two others. The crew's work consisted in shuttling freight cars about the yards in accordance with the requirements of the railroad's freight schedule.

The fatal switching maneuver was the shifting of two boxcars from their position on the "lead" track, west of a switch designated No. 7, to track 13. To accomplish this the engine was required to proceed westerly along the "lead" line until it hooked up the two freight cars, then to back the train thus formed along that line over switch 7 and, after the switch was set, to "kick" the cars so they would roll over the switch on to track 13, while the engine stopped and started back to get another car. The engineer's cab was on the north side of the track, the switch stand and handle were on the south side.

While the engine was slowly backing after being coupled to the freight cars, Owens and one of his men, Koefod, rode on the north side of the train, clinging to the facing stirrups and hand-rails between the two boxcars. As the cars crossed the switch, Owens dropped off on the north side, telling Koefod to "let these cars go 13." When the train had passed, Owens crossed to the south side in order to set the switch. The train stopped with its western end at a distance estimated variously at seven to thirty feet from, but in any event unusually close to, the switch point. Koefod dropped off on the north side of the track and took a position about 20 feet north of the track from which he could see the switch points but could not see either the switch handle or Owens, both being obstructed from his view by the cars. Similarly, the engineer, on the north side of the train, could not see Owens. The other two men also were out of vision. When Koefod saw the switch point move into line, without awaiting any sign from Owens he signalled the engineer to "kick" the cars. This the latter promptly did. No warning was given to Owens either by bell, by whistle, or by call on starting the "kick." It is important to note that, all told, between the stopping of the receding train and the "kick" about ten seconds elapsed.

In this interval, Owens, having set the switch, began to walk across the track to the north side. No evidence was available or introduced to show his reason for doing so.<sup>1</sup> Since he was looking northward, he did not see the "kicked" cars coming toward him until too late. He then tried to leap out of the way, but failed and was struck by the cars, which rolled over him. His legs were

<sup>1</sup> Indeed, the only evidence on the question of decedent's movements during this time is furnished by an engineer who saw the accident from the cab of a nearby engine. He testified:

"He was looking north—just for an instant he turned his head down to the yard and when he straightened his head up—why just before he straight-

severed from his body. Although he was removed to a hospital almost at once, he died within a few hours.

If this were all the evidence, the case would be clearly one in which the jury might find there was negligence on the part of Koefod or the engineer, or both, and that Owens' conduct amounted to no more than contributory negligence, if it was that.

But the company sought to avoid the effect of these facts by proving that Rule 30 was not applicable in ordinary switching operations, that it was not customary to ring the engine's bell during them, that it was customary for the man at the switch handle to remain there until movement of the "kicked" cars stopped, that it was the practice for the man in Koefod's position to signal for the kick without waiting either for a signal from the man at the switch, or to see whether the latter remained there, and that Owens had followed these practices in the past.

The purpose of this evidence apparently was twofold. The first object was to show that the company was not negligent. It sought particularly to avoid the effect of a finding that the engineer's failure to ring the bell was a violation of Rule 30 and therefore was negligence per se. But the evidence also was directed to prove that, apart from the ringing of the bell, neither Koefod nor the engineer acted negligently in assuming that Owens knew the matters sought to be proved and would remain at the switch until the cars had passed by; and therefore that they acted properly in going ahead without taking the precautions which would have been necessary if they had not been entitled to make this assumption.

The same evidence also was the basis of the company's contention that Owens assumed the risk of his injury. Although the Court of Appeals declined to determine whether it would support a legal conclusion there was no negligence, it apparently accepted the company's view that it established assumption of risk as a matter of law.

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ened his head up I got scared and I says 'them cars are going to corner him'—they were coming about six miles an hour—I had no way of telling how fast they were going—I had a head end view of the cars and before I could do a thing, or give him any warning, I was too far away—just as he turned around he seen the cars coming almost on top of him—he didn't have time to get out of the way—he threwed himself back and sideways, and as I recollect a draw bar hit him about in here—his right side—

Q. "What happened to him?"

A. "It knocked him down right in the center of the track; as near as I could understand the first part of the trucks run over him."

The difficulty with this ruling is that it ignores conflicting evidence presented on behalf of petitioner. This consisted in testimony to the effect that the men in the switching crew customarily "looked out" for each other, particularly when a man was not in sight during operations, that one in Koefod's position would not signal for the "kick" until he saw that the man at the switch was out of harm's way, and that there was a custom to wait before ordering the "kick" until the man at the switch signalled to the man in Koefod's position.

In this state of the record there was a square clash of evidence bearing on whether Owens knew that the cars would be "kicked" without any prior indication to him—either by ringing the bell or by signal from others in the crew—and decided to cross the track anyway. And these questions were crucial, in the circumstances, to whether he voluntarily assumed the risk of the conduct which brought about his death.

That is true, unless it is to be held that Owens, when he accepted and continued in his employment, knew that risks of the general character which caused his death would be incurred and, by taking or continuing in the work, accepted their burden; in other words, not that he knew of and accepted the particular risk at the time it descended, but knew generally that risks of such a character might fall and elected in advance to sustain them. We think no such view is consistent with the statute's provisions.

Recently this Court reviewed "the maze of law which Congress swept into the discard,"<sup>2</sup> when in 1939 it amended the Employers' Liability Act to abolish the defense of assumption of risk.<sup>3</sup> In view of the amendment, no good purpose would be served in going over this morass again merely to dispose of this case. But we point to a few lodestars.

The common-law defenses, assumption of risk, contributory negligence, and the fellow-servant rule were originated and developed in common ground.<sup>4</sup> Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a confusion which only served

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<sup>2</sup> *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54.

<sup>3</sup> 53 Stat. 1404, 45 U. S. C. § 54.

<sup>4</sup> *Cy. Priestley v. Fowler*, 3 M. & W. 1 (1837); *Farwell v. Boston & Worcester R. R. Corp.*, 4 Mete. (Mass.) 49; *Bohlen, Voluntary Assumption of Risk*, 20 *Harv. L. Rev.* 14, 91 (1906); *Butterfield v. Forrester*, 11 *East* 60 (1809); *Davies v. Mann*, 10 M. & W. 546 (1842); *Bohlen, Contributory Negligence*, 21 *Harv. L. Rev.* 233 (1906).

to create more;<sup>5</sup> so that in time the three became more, rather than less, indistinguishable. And assumption of risk took over also, in misguided appellation, large regions of the law of negligence. What in fact was absence of departure from due care by the defendant came to be labelled "assumption of risk."<sup>6</sup> Apart from this effect, so long as the area of application was overlapping<sup>7</sup> and each when established had the effect of defeating liability, it was not a matter of great moment to distinguish the defenses sharply or carefully, when the facts would sustain one.

But under the Employers' Liability Act prior to 1939 there was inescapable reason for making accurate differentiation of the three. For each produced different consequences. Assumption of risk remained a complete defense to liability. Contributory negligence merely reduced the damages.<sup>8</sup> The fellow-servant rule was abolished.<sup>9</sup>

These distinct consequences required distinct treatment of the three conceptions. This meant that so far as assumption of risk, which remained a complete defense, had swallowed up contributory negligence and the fellow-servant rule, the latter, having different effects, should be withdrawn from its enfolding embrace. In that way only could the clear legislative mandate be carried out and the distinct consequences attributed by it to each be attained. To permit assumption of risk still to engulf all the proper territory of contributory negligence and the fellow-servant rule would be only and plainly to nullify Congress' command.

Unfortunately the injunction has not been followed consistently. There are decisions which, in the guise of applying assumption of risk, do no more than shift to the injured employee the burden of his fellow servants' negligence, while others appear to identify the doctrine with mere contributory negligence. Old confusions die hard. And in this instance some refused to die at all or did

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<sup>5</sup> Cf. *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54, and authorities cited.

<sup>6</sup> *Ibid.*, concurring opinion of Mr. Justice Frankfurter; *Hocking Valley Ry. Co. v. Whitaker*, 299 Fed. 416 (C. C. A.); Harper, *Torts* (1933) 292, and authorities cited, note 11; Bohlen, *Voluntary Assumption of Risk*, 20 *Harv. L. Rev.* 14, 91.

<sup>7</sup> Cf. Bohlen, *Contributory Negligence*, 21 *Harv. L. Rev.* 233, 243, *et seq.*

<sup>8</sup> 35 Stat. 66.

<sup>9</sup> 35 Stat. 65; *Chesapeake & Ohio R. R. v. De Atley*, 241 U. S. 310; *Second Employers' Liability Cases*, 223 U. S. 1; *Reed v. Director General of Railroads*, 258 U. S. 92.



so only intermittently. We do not now attempt the refined distinctions or the broader obliterations which might be required, if the 1939 amendment had not become law, in order to give effect to the original Congressional purpose. It is wholly inconsistent with that object and with the statute's wording to hold that the employee, merely by accepting or continuing in the employment, assumes the risk of his fellow servants' negligence or that conduct on his part in a particular situation which amounts to no more than contributory negligence can have that effect.

In this case, if there was negligence upon the employer's part, as to which we express no opinion, it lay either in the company's failure to enforce Rule 30, if that rule was applicable to switching operations, or in the negligence of a fellow servant of Owens and nothing more than that.<sup>10</sup> In the former case, assumption of risk would not apply, at any rate as a matter of law, in the absence of conclusive proof that the employee knew the rule was not applicable or had been abandoned and elected to take his chances in crossing the track.

If we turn then to the other alternative, the fellow-servant doctrine contemplated that an employee knew and assumed, when he accepted employment, the risks which negligence of his fellow employees might create. It was in fact a branch of assumption of risk. When therefore Congress abolished the fellow-servant rule as a defense under the statute, it necessarily abolished the defense of assumption of risk to this extent. In other words, it eliminated the general anticipation of fellow servants' negligence upon which the fellow-servant rule was founded. If anything of assumption of risk remained in relation to the negligence of a fellow employee, it was such as required a showing that the injured one knew of and accepted the risk in the particular incident or situation which brought about his injury. There was therefore in this case, consistently with the statute, no general assumption by Owens, by virtue of his acceptance or retention of the work,

<sup>10</sup> This is true whether the fellow servant's negligence consisted in a violation of Rule 30, as the trial court permitted the jury to find, or in any of the other allegedly negligent acts or omissions, which the court refused to submit to the jury. For in any event the conduct claimed to be negligent was that of Koefod or the engineer, both of whom were fellow servants. We cannot assume that the court, when it cast its decision in terms of assumption of risk, intended to rule that there was no evidence of negligence (cf. note 6, *supra*), since its opinion expressly disclaims determining the proper construction of Rule 30, whether its violation would constitute negligence per se, and the other questions raised by the parties on the appeal.

of the risk which caused his death in so far as it consisted in negligence by Koefod or the engineer.

What remained of the defense, therefore, narrows the inquiry to whether Owens can be shown to have anticipated and decided to chance the particular risk here created by the negligence of his fellow employees. Cf. *Reed v. Director General of Railroads*, 258 U. S. 92. As has been shown, respondent has not sustained this burden. That is true, whether the inquiry is couched in terms of Owens' actual knowledge<sup>11</sup> and deliberate choice<sup>12</sup> or of the "obvious" and "apparent" character of the risk.<sup>13</sup> For, to prevail on this defense, respondent had the burden of persuading the jury that the risk of being run down was "so plainly observable" that Owens was in fact aware of it and decided to chance it. Less than that, under this statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense. The jury decided that respondent had not sustained the burden imposed. We cannot agree with the Court of Appeals that as a matter of law it has. The record shows neither such clear evidence of an informed and deliberate choice by Owens as would preclude a contrary verdict nor so "obvious" or "apparent" a danger as would do so.<sup>14</sup>

If there was negligence by the respondent, the statute requires something more than contributory negligence to defeat recovery, though that may minimize the damages. The jury found this issue in favor of the plaintiff. And the Court of Appeals did not purport to deal with it and did not do so unless, in the guise of finding assumption of risk, it identified the two. Since it did not deal with the question, we do not decide it. But we think it is clear that on the facts Owens' conduct amounted to no more than contributory negligence, if it was that.

<sup>11</sup> Cf. 3 Labatt, *Master and Servant* (1913), §§ 1190-1192; *York v. Chicago, M. & St. P. R. R.*, 184 Wis. 110; *Dollar Savings Fund & Trust Co. v. Pennsylvania Co.*, 272 Pa. 364; *Rummell v. Dilworth*, 111 Pa. 343.

<sup>12</sup> Cf. *Thomas v. Quartermaine*, L. R. 18 Q. B. D. 685; *Yarmouth v. France*, L. R. 19 Q. B. D. 647; *Smith v. Baker & Sons* [1891] A. C. 325.

<sup>13</sup> Cf. *Seaboard Airline R. R. v. Horton*, 233 U. S. 492; *Gila Valley, G. & N. R. R. v. Hall*, 232 U. S. 94; *Chesapeake & Ohio R. R. v. De Atley*, 241 U. S. 310; *Chicago & N. W. R. R. v. Bower*, 241 U. S. 470; *Chesapeake & Ohio R. R. v. Proffitt*, 241 U. S. 462; and compare *Schlemmer v. Buffalo, R. & P. Ry.*, 205 U. S. 1, 220 U. S. 590; *Bohlen, Contributory Negligence*, 21 Harv. L. Rev. 233; *Alexander, Re-Thinking Negligence*, 11 Miss. L. J. 290.

<sup>14</sup> Cf. *Gila Valley, G. & N. R. R. v. Hall*, 232 U. S. 94; *Chesapeake & Ohio R. R. v. De Atley*, 241 U. S. 310; *Chesapeake & Ohio R. R. v. Proffitt*, 241 U. S. 462; *Chicago, R. I. & P. R. R. v. Ward*, 252 U. S. 18; *Chicago & N. W. R. R. v. Bower*, 241 U. S. 470.



Whether the trial court properly charged the jury that a violation of Company Rule 30 was ipso facto negligence<sup>15</sup> and took from it the other claimed grounds of negligence<sup>16</sup> are questions the Court of Appeals did not reach and we therefore have no occasion to decide. Similarly, in view of our conclusion on assumption of risk, we have no occasion to determine whether the 1939 amendment to the Federal Employers' Liability Act, abolishing that defense, operates where the accident occurred before its enactment but suit is brought after.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings in conformity with this opinion.

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Mr. Justice REED dissents because he reads the evidence as showing without contradiction that Rule 30 was not applicable to these switching operations and that it was the practice of switching crews under the circumstances of this movement to "kick" the cars without waiting for a signal from the man in decedent's position at the switch. It follows that the defense of assumption of risk is good.

The CHIEF JUSTICE and Mr. Justice ROBERTS join in this dissent

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<sup>15</sup> Cf. *Gildner v. Baltimore & Ohio R. R.*, 90 F. 2d 635 (C. C. A.); *Pacheco v. New York, N. H. & H. R. R.*, 15 F. 2d 467 (C. C. A.).

<sup>16</sup> "(a) that defendant and defendant's employees carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars; which said lookout was the custom and practice known to and adopted by defendant; (b) that defendant and defendant's employees carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent; (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars; the receipt of which said signal was the custom and practice known to and adopted by defendant; . . . (e) that defendant carelessly and negligently failed and neglected to provide plaintiff with a safe place to work."